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## The American Bar Foundation Survey of the Administration of Criminal Justice and Past, Present, and Future Responses to Domestic Violence

Raymond I. Parnas

*University of California, Davis*

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# THE AMERICAN BAR FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE AND PAST, PRESENT, AND FUTURE RESPONSES TO DOMESTIC VIOLENCE

RAYMOND I. PARNAS\*

Almost everyone today is aware that acts of physical violence in the home between spouses and other adult intimates are a statistically common occurrence. It is well known that the cycle of repetition, injury escalation, and ultimate homicide occurs worldwide. Books on the subject abound.<sup>1</sup> Newspapers and magazines periodically run features on the subject. Documentaries and movies, such as the highly publicized prime-time movie "The Burning Bed," and more recently, "Cry for Help," are shown on television.

National, state, and local organizations, both private and public, have been created to focus attention on the issue. In 1984, Congress passed the Family Violence Prevention and Services Act.<sup>2</sup> Every state now has some kind of legislation, civil, criminal, or both, specifically directed at coping with this problem. These statutes establish, among other things, crisis shelters, protective orders, specialized police training, altered arrest requirements, charging guidelines, and treatment programs. Litigation to mandate remedial action is abundant, and research is continuous. Po-

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\* With invaluable assistance by Scott Taryle, Melissa Hill, and Allison Hughes, University of California at Davis School of Law.

This Article was originally prepared for inclusion in a forthcoming book of essays on the overall impact of the American Bar Foundation Survey of Criminal Justice, to be edited by Lloyd E. Ohlin.

I owe much of my professional career to retiring Professor Frank Miller to whom this issue is dedicated. When I was a student at Washington University School of Law from 1961 to 1964, he made the study of Criminal Law interesting with his challenging hypotheticals, always beginning with "Suppose Mr. Parnas, . . . ." His Criminal Justice Administration Seminar's focus on prosecutorial discretion began my life long interest in the charging decision. When I began to think about leaving private practice for teaching in 1966, he encouraged me and helped me to go to his alma mater, Wisconsin, for graduate work. I have been honored to be a co-author on casebooks with him since 1972. He is a friend for whom I have great respect, and to whom I wish much continued health and happiness.

1. For a very recent and excellent summary of many issues, see FAMILY VIOLENCE (L. Ohlin and M. Tonry, eds. 1989).

2. 42 U.S.C. §§ 10401-10413 (1988).

lice, prosecutors, judges, and other relevant entities hold meetings and promulgate policy statements on the issue.

### I. THE PAST

It was not always so. Until 1967 not a single book or journal article focused on the law's response to intrafamily violence.<sup>3</sup> There was practically no legislation on the subject, nor focused organizations, reported litigation, or published research. Immediately prior to 1967, knowledge of the extent and complexity of the problem existed almost totally within the confines of the families affected, the responsible agencies, and those familiar with the empirical data derived from the ABF Survey of the Administration of Criminal Justice<sup>4</sup> conducted in Michigan, Wisconsin, and Kansas in 1956 and 1957.

ABF Survey researchers repeatedly chronicled domestic disputes as they described the daily activities of the criminal justice agencies they observed. Accordingly, several writers, having early access to the ABF data, published works implicitly or expressly including the issue of domestic violence within their focus. For example, Professor Joseph Goldstein in his classic article, "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice,"<sup>5</sup> stated that the American Bar Foundation provided him with access to confidential daily reports of a large municipal police force.<sup>6</sup> Drawing on those reports, Goldstein devoted several pages to a description of routine non-enforcement practices in admittedly very common felonious assault cases. The major reason cited for non-arrest was the victim's refusal to prosecute. Other reasons mentioned included the extensive paper work required for so many arrests, limited resources to investigate other crimes, cross-cultural bias by white police regarding inter-"Negro" assaults, and the prediction of dismissal by the court or prosecutor due to

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3. *But see* R. ADAMS, *WIFE BEATING AS A CRIME AND ITS RELATION TO TAXATION* (1886), cited in Pleck, *Criminal Approaches to Family Violence, 1640-1980* in *FAMILY VIOLENCE*, *supra* note 1, at 19.

4. The American Bar Foundation published the results of its survey in a five-volume series: R. DAWSON, *SENTENCING* (1969); W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1969); L. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1969); L. TIFFANY, D. MCINTYRE, AND D. ROTENBERG, *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* (1966).

5. Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 *YALE L.J.* 543 (1960).

6. *Id.* at 554.

an uncooperative victim.<sup>7</sup>

Goldstein's work was clearly very important in illuminating the common occurrence of assaults, describing the police response, discussing the reasons for this practice, and questioning its appropriateness. It is fascinating, however, that he never addressed the context in which these assaults occurred. In other words, he never mentioned the intimate, spousal, family, or domestic nature of many of the assaults he reviewed. Is that complicating factor irrelevant to the victim's lack of cooperation in prosecution? Is it irrelevant to the routine response of non-arrest, prosecution, or conviction? Is it irrelevant to fashioning an appropriate governmental response to a clear violation of the penal code? Despite these possible analytical omissions, long before arrest became fashionable in domestic violence cases (as it is today), Goldstein in that seminal article urged arrest as a more appropriate response to felonious assault. But is that because he, like today's domestic violence-arrest advocates, failed to comprehend adequately the complexity and implications of the "family" context of so many of these assaults? But I am getting ahead of myself. For now, let's see what followed Goldstein's very influential 1960 piece.

In 1965 the ABF published the first volume analyzing its field data. In *Arrest: The Decision to Take a Suspect into Custody*,<sup>8</sup> Wayne LaFave used a variety of domestic violence incidents from the field studies as illustrations for many of the factors he thought played a role in police decisionmaking. Thus, not only did the visibility level of common assaults increase, as begun by Goldstein, but now, for the first time, the domestic nature of much of the violence became public. Additionally, the use of specific illustrations drawn directly from the field studies highlighted the complexity of a variety of family violence situations. For example, LaFave dramatically illustrated Goldstein's cross-cultural bias non-arrest factor by using a "Negro" spousal stabbing incident in a section entitled "Conduct Thought to Reflect the Standards of a Community Subgroup."<sup>9</sup>

Taking Goldstein's work still further, LaFave established three categories of cases in which the "victim does not or will not request prosecution." Two of these categories involved close contact between the participants as a discrete discriminating factor: 1) "Victim in continuing

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7. *Id.* at 573-580.

8. W. LAFAVE, *supra* note 4.

9. *Id.* at 110-114.

relationship with offender,” and 2) “Victim a member of offender’s family.”<sup>10</sup> He acknowledged “[t]he reluctance of the victim to prosecute makes conviction difficult or impossible and is at least some indication that the offense is not serious enough to justify the expenditure of time and effort of the police and prosecutor.”<sup>11</sup>

But LaFave also found exceptions to the non-arrest rule. For example, arrests would occur when police had knowledge of repeated offenses, when a brief lecture did not close the incident, or when the offender threatened subsequent harm (even though the victim did not wish to prosecute).<sup>12</sup> LaFave used domestic violence incidents to illustrate his following pro-arrest categories:

1. Tactics employed when arrest is desired [but not authorized] for a misdemeanor not in the presence:<sup>13</sup>
  - a. Encouraging another offense and thus creating a basis for a lawful arrest.
  - b. Persuading the suspect to remain voluntarily in custody while warrant is obtained.
2. Arrest to avoid a strain upon available resources [known repeated calls in the past].<sup>14</sup>

Like Goldstein, LaFave in 1965 considered full arrest, but did so explicitly in the domestic dispute context and with ABF examples. One Michigan police chief, disturbed by the number of domestic calls received, issued a directive requiring an arrest in all domestic disputes, presumably believing that this would end the calls for service. However, no evaluation of this policy change was possible because the City Attorney reversed it after only one week’s duration. LaFave’s comment about that policy is interesting in light of the current full enforcement craze. It contrasts with Goldstein’s earlier, more positive view of full arrest, possibly again because of LaFave’s better appreciation of the complexity of these incidents. He said:

More likely the effect would be to reduce the number of complaints when it became known that the spouse would be put in jail as a consequence of any complaint made. Such a consequence would not necessarily be desirable, particularly if no other agency were ready to assume the task of mediating

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10. *Id.* at 119-123.

11. *Id.* at 114.

12. *Id.* at 144-152.

13. *Id.* at 28-30.

14. *Id.* at 144.

family disputes which had been handled by the police.<sup>15</sup>

The Misdemeanor Complaint Bureau (MCB), a very imaginative quasi-judicial response to domestic violence fashioned by the Detroit police and prosecutor, was also discovered in the ABF data and reported for the first time by LaFave.<sup>16</sup> In 1969, Frank Miller's ABF Survey book, *Prosecution: The Decision to Charge a Suspect with a Crime*, gave the MCB greater prominence in his chapter, "The Decision Not to Charge Because Informal Administrative Procedures More Satisfactorily Achieve Objectives Underlying Criminal Statutes." Section B of that chapter dealt with "Family and Neighborhood Assaults: The Misdemeanor Complaint Bureau." Miller reported that despite the vast number of family assault complaints and victim's initial insistence on prosecution, prosecutors dissuaded prosecution, and therefore, few occurred. Resource and priority considerations were only partly the cause of this practice. Prosecutors generally discouraged victims from pressing charges against their attackers because they found that most victims changed their minds before trial, making successful prosecution impossible or difficult.<sup>17</sup> Another complicating factor for successful prosecutions was said to be the frequent shared "guilt" of the parties.<sup>18</sup> Additionally, it was felt that charging would "place an additional strain on an inevitably continuing relationship."<sup>19</sup> Prosecutors therefore preferred amicable solutions to these problems, an alternative to field adjustment or prosecution.<sup>20</sup> It was apparently in this contextual understanding of domestic violence that the MCB was born. An assistant prosecutor screened complaints for dismissal, charge, or referral to the MCB. Most domestic assaults were referred. A hearing date was set about one week after the complaint and notices were delivered. If no one appeared, reconciliation was assumed, and the case dropped. Second notices were sent if the victim appeared without the defendant and wanted to proceed. A subsequent failure to appear by the defendant resulted in a charge and a warrant. The hearing, held in a room in the prosecuting attorney's office, was conducted by a detective, often referred to as "Judge."<sup>21</sup> Mediation and/or referral was the goal, and four general dis-

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15. *Id.* at 145-146.

16. *Id.* at 123, 144-146.

17. F. MILLER, *supra* note 4, at 266-267.

18. *Id.* at 267.

19. *Id.*

20. *Id.*

21. *Id.* at 268.

positions were available to promote this goal: 1) dismissal because of minor or equal guilt, or due to victim's decision to cease further prosecution efforts; 2) recommendation of formal judicial process by warrant (in cases of severe physical injury); 3) adjournment without date; and 4) "peace bond."<sup>22</sup>

Adjournment without date implied official action if further difficulties arose, but in fact a new offense was necessary. The "peace bond" was the most frequent disposition, though it had no foundation in Michigan law and indeed no bond was actually posted. Nonetheless, an informal record was kept and imposition was sometimes taken into account (if known) in subsequent charging or MCB decisions.<sup>23</sup> What can be said of a creative, arguably successful, but legally unfounded, sham perpetrated on the public by our legal system? Miller, discussing similar use of a "peace bond" by Chicago courts, concluded:

When the active endorsement of the system by police, prosecutors, and private defense attorneys is combined with the complainant's and defendant's unawareness of the lack of any official standing of the peace bond, it is not surprising that the procedure is effective both to satisfy the complainant that there has been "official" action taken with respect to the complaints, and to deter the defendant from future infractions. The detectives in the domestic relations detail estimate that 85 per cent of the cases in which the defendant is placed on a peace bond achieve the desired result. Indeed, frequently complainants go to the prosecutor's office requesting the imposition of the peace bond.<sup>24</sup>

In between the publication of the two aforementioned ABF books, the President's Commission on Law Enforcement and Administration of Justice issued its report, the *Challenge of Crime in a Free Society*,<sup>25</sup> and supporting Task Force reports. Many of those who had worked on the ABF Survey and books were also on the Commission staff. The ABF data itself was used in the Commission Reports.<sup>26</sup> The *Challenge of Crime* focused greater attention than ever before on many of LaFave's earlier observations about domestic violence. But it went further by

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22. *Id.* at 269.

23. *Id.* at 269-270.

24. *Id.* at 270-271 (footnotes omitted).

25. U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967) [hereinafter *THE CHALLENGE OF CRIME*].

26. *Id.* at 276, 291; TASK FORCE REPORT: *THE POLICE 50-51* (1967) [hereinafter *THE POLICE*].

specifying issues in need of further research and recommending policy guidelines for the exercise of police discretion. For example:

A common kind of situation that illustrates the complexity, delicacy—and frustration—of much police work is the matrimonial dispute, which police experts estimate consumes as much time as any other single kind of situation. These family altercations often occur late at night, when the only agency available to people in trouble is the police. Because they occur late at night, they can disturb the peace of a whole neighborhood. And, of course, they can lead to crime; in fact, they are probably the single greatest cause of homicides. Yet the capacity of the police to deal effectively with such a highly personal matter as conjugal disharmony is, to say the least, limited. Arresting one party or both is unlikely to result in either a prosecution or a reconciliation. Removing one of the parties from the scene, an expedient the police often resort to, sometimes by using force, may create temporary peace, but it scarcely solves the problem. An order to see a family counselor in the morning is unenforceable and more likely to be ignored than obeyed. And mediating the difficulty of enraged husbands and wives ad hoc is an activity for which few policemen—or people in any other profession—are qualified by temperament or by training. Again no statistics are available, but there is a strong impression in police circles that intervention in these disputes causes more assaults on policemen than any other kind of encounter.

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Handling minor disputes is an activity that is regarded as of small importance by most police administrators. Yet it occupies a great deal of the time of many policemen. To the disputants themselves, who are more often than not law-abiding citizens, the manner in which the police intervene in their affairs is a matter of great importance. Disputes, particularly domestic disputes, as discussed earlier, are a subject about which it would be difficult to formulate policy without first engaging in considerable research. The police should seek to accumulate information about families that cause repeated disturbances, to discover whether certain kinds of disturbances are more likely than others to lead to serious assaults or to homicides, to compile statistics on the typical effects of having one of the parties swear out a complaint against the other, to become familiar with the social-service agencies, if any, to which troubled families can be referred. For the police to mediate, arbitrate or suppress each dispute that they encounter as if it were unique—or as if all disputes were alike—contributes little, in the long run, either to law enforcement or to community service.<sup>27</sup>

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27. THE CHALLENGE OF CRIME, *supra* note 25, at 92, 104.



The Commission recommends:

Police departments should develop and enunciate policies that give police personnel specific guidance for the common situations requiring exercise of police discretion. Policies should cover such matters, among others, as . . . the handling of minor disputes, . . . and the decision whether or not to arrest in specific situations involving specific crimes.<sup>28</sup>

The Commission's *Task Force Report: The Police* more explicitly and directly questioned both the necessity and efficacy of both non-arrest and non-prosecution practices even if the victim was uncooperative.<sup>29</sup> Though also concerned about ghetto-police relations in regard to a broader variety of aggravated assaults, the report specifically includes domestics in its comments:

The police handling of aggravated assaults raises issues of a different character. These offenses come to police attention more routinely because they frequently occur in public; the victim or witnesses seek out the police; there is a desire for police intervention before more harm is done; or simply because the victim desires police assistance in acquiring medical aid. But while the perpetrator is known to the victim in a high percentage of the cases, there frequently is no arrest or, if an arrest is made, it is followed by release by the police without prosecution. This is especially true in the ghetto areas of large urban centers, due, according to police, primarily to an unwillingness on the part of the victim to cooperate.

The failure to make an arrest for a serious assault is especially common if the parties involved are related or close friends. Police, based upon their experience, feel that there will be an unwillingness on the part of the victim to assist . . . . Even if the victim cooperates at the investigation stage, the police assume from their experience that the willingness to cooperate will disappear at the time of trial when the victim will refuse to testify and may even express a desire that the assaultive husband or acquaintance be set free.

It would be possible for police to achieve some success in assault cases by resort to the subpoena in order to compel the victim to testify. But this procedure is seldom used. Given the high volume of cases and the competing demands upon a police agency, the path of least resistance is to acquiesce to the desires of the victim. The position is often rationalized on the grounds that the injured party was the only person harmed and that the community as a whole was not affected by the crime. These cases can be written off statistically as clearances, which is viewed as an index of police efficiency, and thus the most immediate administrative pressure is satisfied

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28. *Id.* at 104.

29. THE POLICE, *supra* note 26, at 21-24.

. . . . Were the police to review their current practices, they might well conclude, for example, that so far as assaults are concerned, it is desirable to base police decisions to arrest on such criteria as the nature of the assault, the seriousness of the injury, and the prior record of the assailant.<sup>30</sup>

But one year later, in 1968, the *Report of the National Advisory Commission on Civil Disorders (Disorders Commission Report)*<sup>31</sup> seemed again to emphasize non-arrest by focusing on the service, non-adversary functions of the police in a domestic violence context:

The Commission believes that police cannot, and should not, resist becoming involved in community service matters. There will be benefits for law enforcement no less than for public order.

First, police, because of their 'front line position' in dealing with ghetto problems, will be better able to identify problems in the community that may lead to disorder. Second, they will be better able to handle incidents requiring police intervention, particularly marital disputes that have a potential for violence. How well the police handle domestic disturbances affects the incidence of serious crimes, including assaults and homicides. Third, willing performance of such work can gain police the respect and support of the community. Finally, development of nonadversary contacts can provide the police with a vital source of information and intelligence concerning the communities they serve.<sup>32</sup>

The above publications, all written in the 1960s, drew upon the ABF data and asked questions about the adequacy of societal responses. For the first time, the problem of domestic violence began to arouse public attention. But these early public references, as important as they were, still left our initial knowledge of intrafamily assaults in the shadows. They treated the topic briefly and then only in the context of other primary concerns—police discretion, arrest, crime, charging, and civil disorders.

Toward the end of the 1960s, two researchers independently focused their energies on domestic violence alone. Dr. Morton Bard, from the Psychological Center of CUNY, along with Dr. Sydney Berkowitz, began training police in family crisis intervention. Their program subsequently influenced police training programs throughout the United States. About the same time, in 1967, I began to publish a series of law journal articles describing the problem of intrafamily violence and the

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30. *Id.* at 22.

31. Also known as the "Kerner Commission Report" [hereinafter *Disorders Commission Report*].

32. *Id.* at 167.

variety of existing public and private responses to that phenomenon.<sup>33</sup>

Just as the National Advisory Commission on Civil Disorders emphasized the police "service" function respecting marital disputes,<sup>34</sup> Bard and Berkowitz's Family Crisis Intervention Unit (FCIU) project emphasized crime prevention by training police to intervene not only as law enforcers but as subprofessional mental health specialists, primarily using mediation and referral techniques. The Bard-Berkowitz approach included family crisis specialist selection, intensive mental health pretraining, and in-service training, which resulted in special patrol units responding to all family crises.<sup>35</sup> Indeed, the *Disorders Commission Report* expressly cited the FCIU project as a program of special interest to improve police performance of the "service" function.<sup>36</sup> Whether due to political reasons, resource limitations, or uncertain evaluative data, however, the Bard-Berkowitz comprehensive approach was not wholly continued in New York or elsewhere beyond the early seventies. But cities like Oakland, California and Louisville, Kentucky attempted to replicate many aspects of New York's FCIU; departments everywhere, learning from the publicity it received, added or increased training in family crisis intervention techniques. Thus, the Bard and Berkowitz work, at a minimum, increased awareness of the problem, suggested its complexity, and greatly stimulated police training.

According to Bard, the FCIU experiment did not have its origin in the ABF data. Rather, it was born out of Bard and Berkowitz's prior personal job experience as policemen.<sup>37</sup> In contrast, the catalyst for my work on this subject was Professor Frank Remington, Director of the ABF Survey Project Staff and Editor of the ABF Survey books. I drew

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33. These works include: Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585 (1970) [hereinafter *Judicial Response*]; Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 LAW & CONTEMP. PROBS. 539 (1971) [hereinafter *Police Discretion*]; Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914 (1967) [hereinafter *Police Response*]; Parnas, *Prosecutorial and Judicial Handling of Family Violence Matters*, 9 CRIM. L. BULL. 733 (1973); Parnas, *The Relevance of Criminal Law to Interspousal Violence*, in *FAMILY VIOLENCE: AN INTERNATIONAL INTERDISCIPLINARY STUDY* (J. Eekelaar & S. Katz eds. 1978) [hereinafter, *The Relevance of Criminal Law*]; Parnas, *The Response of Some Relevant Community Resources to Intra-Family Violence*, 44 IND. L.J. 159 (1969) [hereinafter *Response of Some Relevant Community Resources*].

34. *Disorders Commission Report*, *supra* note 31, at 167.

35. See e.g., Bard & Berkowitz, "Training Police as Specialists in Family Crisis Intervention: A Community Psychology Action Program," 3 COMMUNITY MENTAL HEALTH J. 315, 317 (1967).

36. *Disorders Commission Report*, *supra* note 31, at 167.

37. Conversation with Bard, Summer 1989.

the initial data directly from ABF data printouts, the ABF Survey books, and the few other ABF influenced works discussed above. Like Bard, I focused solely on domestic violence, but my scope was much broader—indeed, the entire universe of available intrafamily dispute information. In five law journal articles published from 1967 to 1973,<sup>38</sup> I described intrafamily violence in the context of police, prosecutor, judicial, and other community responses to it. In addition to the ABF material gathered in 1956 and 1957, the articles analyzed lengthy personal observations of the Chicago response network of ten years later, together with empirical data acquired in other key areas around the country in the late 1960s and early 1970s. These articles were the first to focus on this phenomenon, treat it in depth, and describe the complete societal response to it in detail. Equally important, the articles illustrated incidents, categorized practices, and offered explanations for the various responses. In addition, they attempted to quantify the extent of the problem whenever data was available and suggested recommendations for future action.

As to the police, for example, I reiterated the *Challenge of Crimes'* important call for a clearly stated departmental policy related to recruitment and training of officers as well as field practices.<sup>39</sup> I also raised related practical issues concerning the use of specialized units, beat assignment, dispatcher guidelines, repeat offender information in the field, referral mechanisms, follow-up, recordkeeping, and the relevance of subculture criteria. Respecting the prosecutor's office, I recommended that charging decisions be made only by lawyers, that social service adjuncts be used when mediation and referral was needed, and that the use of prosecutors be completely replaced in most domestic assaults by civil family court jurisdiction.<sup>40</sup> Commenting on the criminal judicial response, I recommended the elimination of sham procedures like the MCB's detective "judges" and non-existent "peace bonds."<sup>41</sup> "The traditional [criminal] judicial process is neither an effective solution nor a deterrent, and in fact can aggravate an inflamed situation by imposition of a fine against already depleted finances, or a jail sentence which removes whatever earning capacity or family stability which exists."<sup>42</sup>

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38. See *supra* note 33.

39. *Police Response*, *supra* note 33, at 957; *Police Discretion*, *supra* note 33, at 560-565.

40. *Judicial Response*, *supra* note 33, at 641-644.

41. *Police Discretion*, *supra* note 33, at 562; *Judicial Response*, *supra* note 33, at 600-605, 642-643.

42. *Judicial Response*, *supra* note 33, at 642.

Once again I called for increased resources for mental health and social service court adjuncts.<sup>43</sup> A myriad of innovative responses needed to be explored, including: arbitration, mediation, and conciliation through peer, neighborhood, or ecclesiastical entities, school classes on family living, and better community services outreach programs.<sup>44</sup>

As many of these recommendations suggest, underlying all of these early articles were two overriding themes: (1) prevention of the initial incident or of repetition and escalation of prior incidents; and (2) service and support to the disputants and adjustment of the problem, rather than arrest, prosecution, and conviction in those cases involving nonserious injury. This second goal was dramatically altered in 1977,<sup>45</sup> prior to the full enforcement movement. Clearly those early articles removed any remaining semblance of low visibility from the problem of domestic violence as well as highlighted the complexity of this phenomenon and the difficulties in fashioning adequate and appropriate responses to it.

The first other journal article dealing solely with family violence was not published until 1971.<sup>46</sup> At least seven more specifically focused law journal articles were written by others and published in the seventies.<sup>47</sup> But beginning in 1974 books on the subject began to flow even more quickly, starting with *Scream Quietly or the Neighbors Will Hear*, first published in England by Erin Pizzey. In the United States, the first was Del Martin's *Battered Wives*, published in 1976. More than ten books on the subject were published in the seventies. Accordingly, by 1980 the stage was set for an onslaught of public attention. In 1980 alone, seven law journal articles and at least five books on the issue of battered women were published. And by the end of 1988, over 120 law journal articles and more than 50 books focusing on domestic violence had been published in that partial decade. My ABF-generated seminal articles were repeatedly cited by the next early writers on the subject and continue to

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43. *Id.* at 644.

44. *Response of Some Relevant Community Resources*, *supra* note 33.

45. *The Relevance of Criminal Law*, *supra* note 33.

46. Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259 (1971).

47. Allister & Levy, *Impact of the New Family Offense Legislation*, 50 N.Y. ST. B.J. 648 (1978); Buzawa & Buzawa, *Legislative Responses to the Problem of Domestic Violence in Michigan*, 25 WAYNE L. REV. 859 (1979); Eisenberg & Seymour, *The Self-Defense Plea and Battered Women*, 14 TRIAL 34 (1978); Thompson, *Representing the Accused Charged with an Intra-Family Violence Offense*, 18 PRAC. LAW. 41 (1972, part 8); Note, *Domestic Relations: The Protection from Abuse Act*, . . . 51 TEMP. L.Q. 116 (1978); Note, *Relief for Victims of Intra-Family Assaults: The Pennsylvania Protection from Abuse Act*, 81 DICK. L. REV. 815 (1977); Panel Workshop: *Violence, Crime, Sexual Abuse, and Addiction*, 5 CONTEMP. DRUG. PROB. 385 (1976).

be referenced despite the subsequent glut of literature on the subject.<sup>48</sup>

Focused research, specialized lobbying organizations, voluminous legislation, and litigation demanding appropriate governmental action followed closely upon this inverse publication pyramid. The ABF survey data, publicized and expanded upon by Goldstein, LaFave, Miller, myself, and the President's Crime Commission in the sixties, contributed to the dramatic change in public and institutional recognition of the domestic violence problem. But, undoubtedly, the Women's and Victim's Rights Movements, which were well under way by the early seventies, were much more important focusing influences. Individual adherents, popularized writing, burgeoning quasi-political organizations' rapid growth and actions, and the consequent coverage of a "new" hot topic by the mass media<sup>49</sup> all greatly contributed to pushing domestic violence to the front of public consciousness much faster than scholarly articles and books could. The possible negative implications of this all too common public policy scenario will be discussed later, but for the moment, Virgie Lemond Mouton is probably correct in writing: "With the advent of Women's Liberation, . . . women began speaking out against wife abuse and demanding solutions from the police, the legislatures, other women, churches and other social help organizations."<sup>50</sup>

Erin Pizzey is credited, by those unfamiliar with the earlier writings, with first bringing the problem of wife abuse to the public's attention. In 1971 she organized a center where women could discuss mutual problems. Pizzey published the first book about abused women in England in 1974.<sup>51</sup> By 1975, the National Organization for Women established a National Task Force on Battered Women/Household Violence. In 1976, an International Tribunal on Crimes Against Women met in Brussels to testify about the victimization of women. Del Martin's *Bat-*

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48. A comprehensive English language bibliography, which includes government publications, conference papers, master's theses, doctoral dissertations, directives, handbooks, pamphlets and popular periodicals, had 1783 entries through 1983. E. ENGELDINGER, *SPOUSE ABUSE: AN ANNOTATED BIBLIOGRAPHY OF VIOLENCE BETWEEN MATES* (1986).

49. The intentional use of the mass media to publicize the Minneapolis Domestic Violence Experiment, which led to subsequent emphasis on the arrest response is acknowledged by one of the primary researchers, Lawrence Sherman. Sherman & Cohn, *The Impact of Research on Legal Policy: the Minneapolis Domestic Violence Experiment*, 23 LAW & SOC'Y REV. 117 (1989). For criticism of that intentional publicity, see Lempert, *Humility Is a Virtue: On the Publicization of Policy-Relevant Research*, 23 LAW & SOC'Y REV. 145 (1989).

50. Note, *Wife Abuse Legislation in California, Pennsylvania and Texas*, 7 T. MARSHALL L. REV. 282 (1982).

51. E. PIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (U.S. publication 1977).

*tered Wives*, published in 1976, was also quite influential, as was Faith McNulty's 1980 book, *The Burning Bed*, particularly in its graphic TV-movie adaptation starring Farrah Fawcett. After these efforts, the news media and city and state government officials recognized wife abuse as a social problem.

Organizations on a national, state, and local level proliferated and began to gather and distribute information, lobby for legislation and policy changes, institute litigation, form new organizations, and provide direct victim assistance. At the national level are the National Coalition Against Domestic Violence, the National Woman Abuse Prevention Project, the Family Violence Project of the Center for Women's Policy Studies, and the National Clearing House on Domestic Violence. Most states, if not all, have similar organizations such as Minnesota's Coalition for Battered Women. There are also relevant State Attorney Generals' task forces. At the local level, direct services to victims exist in many places (for example, Sacramento's WEAVE - Women Escaping a Violent Environment). Now available are domestic violence hotlines, crisis shelters, handbooks, victim's guides, and pamphlets that try to lead uneducated victims step-by-step through the protective order filing process. Being a victim or battered spouse advocate has become a new vocation or avocation for many, just as some academicians have made research and writing about this problem their life's work.

## II. THE PRESENT

So what, if anything, has been accomplished beyond the dramatic change from very low visibility to very high visibility? Depending on one's point of view, the answer to this question may be "a great deal," "not very much," or anything in between. Certainly more victims now know they are not alone in their suffering, that what is happening to them is viewed as wrong by society, and that many alternatives are available to them—especially the creation of hidden crisis shelters providing short-term safe housing and counseling.

Domestic violence shelters were the earliest, simplest, most direct, and still most effective societal response as the extent of the problem became widely known. Legislative response followed. For example, despite continual funding problems, the California legislature enacted the Domestic Violence Centers Act<sup>52</sup> in 1977 to help fund such shelters, first on a pilot

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52. CAL. WELF. & INST. CODE §§ 18290-18307 (West Supp. 1991).

project basis and then permanently in 1980. The Act's purpose section provides: "It is the intention of the Legislature to begin to explore and determine ways of achieving reductions in serious and fatal injuries to the victims of domestic violence and begin to clarify the problems, causes, and cures of domestic violence."<sup>53</sup> The Act further provided that "the state shall support projects in several areas throughout the state for the purpose of aiding victims of domestic violence by providing them a place to escape the destructive environment."<sup>54</sup>

Alternatives and process responses, other than crisis shelters, are much more problematic. Let's examine one jurisdiction, California, and chart many of the legislative changes that have taken place up to the current time. In 1945, California Penal Code section 273d was enacted. It distinguished wife assault, providing that "any husband who willfully inflicts upon his wife corporal injury resulting in a traumatic condition, but not constituting a felonious assault or attempted murder . . . is nevertheless guilty of a felony . . . ." In 1977 this part of P.C. 273d became P.C. 273.5, and the new provision became applicable to either spouse "or any person who wilfully inflicts upon any person of the opposite sex with whom he or she is cohabiting."<sup>55</sup> The maximum imprisonment was increased from three to four years in 1980. However, under California law, this crime can also be treated as a misdemeanor if the prosecutor so charges. The statute additionally specifies that, unless a finding of inappropriateness is made, "supervised counseling" is to be a condition of any probation order.

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53. CAL. WELF. & INST. CODE § 18290 (West Supp. 1991).

54. *Id.* Also, the legislature summarized in the purpose section the issue of domestic violence in 1980:

The Legislature hereby finds and declares that there is a present and growing need to develop innovative strategies and services which will ameliorate and reduce the trauma of domestic violence. There are hundreds of thousands of persons in this state who are regularly beaten. In many such cases, the acts of domestic violence lead to the death of one of the involved parties. Victims of domestic violence come from all socioeconomic classes and ethnic groups, though it is the poor who suffer most from marital violence since they have no immediate access to private counseling and shelter for themselves and their children. Children, even when they are not physically assaulted, very often suffer deep and lasting emotional effects, and it is most often the children of those parents who commit domestic violence that continue the cycle and abuse their spouses.

The Legislature further finds and declares that there is a high incidence of deaths and injuries sustained by law enforcement officers in the handling of domestic disturbances. Police arrests for domestic violence are low, and victims are reluctant to press charges or make citizens arrests. Furthermore, instances of domestic violence are considered to be the single most unreported crime in the state.

*Id.*

55. CAL. PENAL CODE § 273.5 (West Supp. 1991).



In 1988, California further tightened section 273.5's probation provisions, requiring a minimum of ninety-six hours county jail time, successful completion of a one-year "batterer's treatment program" for a second conviction within seven years, and a minimum of thirty days in jail, plus the treatment program if two or more convictions under this section in the previous seven years.<sup>56</sup> A showing of "good cause" is required for the court to waive these mandatory minimums.

In 1989, A.B. 238 was passed and sent to the governor to amend Penal Code section 243's misdemeanor battery provisions by increasing the maximum jail incarceration from six months to one year and adding a mandatory one-year batterer's treatment program when probation is ordered if the offense "is committed against a noncohabiting former spouse, fiancé, fiancée, or a person with whom the defendant currently has, or has previously had, a dating relationship."<sup>57</sup> However, A.B. 238 is somewhat ameliorated by the 1979 legislation, which enacted P.C. 1000.6 *et seq.*, authorizing the diversion of those charged with misdemeanors involving an act of domestic violence, other than P.C. 273.5 or assault with a deadly weapon, if they had no conviction of a crime of violence within seven years, had never had probation or parole revoked, and had not been diverted within the last five years. A protective order and treatment program may be conditions of the six-month to two-year diversion. Criminal charges are dismissed if diversion is satisfactorily completed, otherwise they are resumed.

California criminal legislation in 1979 also saw the addition of a spousal rape provision by P.C. 262. P.C. 261 previously defined rape to exclude one's spouse. Now spousal rape differs from other rape in that 1) spousal rape must be reported within ninety days of its occurrence, and 2) it may be treated as a misdemeanor or as any other rape — straight felony and punishable by three, six, or eight years imprisonment.<sup>58</sup>

The California Penal Code now also provides for a variety of court orders to facilitate the reporting of crimes and the testimony of witnesses and victims. These sections provide both misdemeanor and felony penalties for those who dissuade witnesses from testifying or victims from reporting crimes in violation of such court orders.<sup>59</sup>

On the civil front, the first of a long series of assault-specific protective

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56. *Id.*

57. CAL. PENAL CODE § 243(e) (West Supp. 1991).

58. CAL. PENAL CODE § 262 (West 1988).

59. CAL. PENAL CODE §§ 136.1-136.2 (West Supp. 1991).

order statutes was enacted in 1969. In order to prevent continuing physical or emotional harm, California Civil Code section 5102<sup>60</sup> provided for the exclusion of the assaulter from the family home (or from the home of the assaulted party) when both were parties to either divorce, annulment or separate maintenance proceedings. In 1979, a showing of a prior assault or threat was required.<sup>61</sup> Many other protective order provisions followed. By 1989 the California civil arsenal included the following most noteworthy provisions that authorize the court to issue an ex parte order enjoining a party from certain violent acts;<sup>62</sup> provide for a temporary restraining order "upon reasonable proof of a past act or acts of actual violence resulting in physical injury . . .";<sup>63</sup> establish an on-site field procedure for emergency protective orders against both marital and nonmarital household members;<sup>64</sup> and provide for maximum fines and jail sentences for violations of any domestic violence-related order.<sup>65</sup>

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60. CAL. CIV. CODE § 5102 (West Supp. 1991).

61. *Id.* at § 4359.

62. California Civil Code § 4359 authorizes the court in pending dissolution proceedings to issue an ex parte order "enjoining any party from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, or disturbing the peace." Provisions are made for immediate notification of the order to law enforcement agencies and "each appropriate law enforcement agency shall make available . . . information as to the existence, terms and current status of any order issued . . . to any law enforcement officer responding to the scene of reported domestic violence." CAL. CIV. CODE § 4359 (West Supp. 1991).

63. California Code of Civil Procedure § 527, CAL. CIV. PROC. CODE § 527 (West 1990), provides for an ex parte maximum 30-day temporary restraining order to any person "residing with the defendant at the time of the incident, upon reasonable proof of a past act or acts of actual violence resulting in physical injury for the purpose of preventing a recurrence of actual domestic violence and assuring a period of separation." Law enforcement notification provisions are similar to (1) above.

64. California Code of Civil Procedure § 546, CAL. CIV. PROC. CODE § 546 (West Supp. 1991), establishes an on-site field procedure for emergency ex parte protective orders against both marital and nonmarital household members. The provision requires a designated judge to be on call when court is not in session. He may orally issue these orders upon receiving a call from a law enforcement agency asserting "reasonable grounds to believe a person is in immediate and present danger of domestic violence." *Id.* The law enforcement agency's assertion must be based upon the victim's allegation of a recent incident of abuse or threat. If the officer receives judicial approval he completes a Judicial Council form, signs it, gives a copy to the victim, attempts to serve the offender, and files a copy in court. The victim has only until the end of the next judicial day to appear in court for a possible extension of the order (for up to three years) or it terminates. A similar law has existed in Colorado since 1982. COLO. REV. STAT. § 14-4-103 (West 1989).

65. Violation of any of the numerous domestic violence-related orders constitutes a misdemeanor punishable by as much as \$1000 fine and a maximum of six months in jail. CAL. PENAL CODE 273.6(a) (West Supp. 1991). A violation involving physical injury mandates a minimum 48-hour incarceration. *Id.* at § 273.6(b). A 1988 amendment raised the possibility of confinement for a repeat order violation involving violence or "a credible threat" of violence within seven years of a

By 1989 all but two states provided for some kind of special protective orders in domestic violence cases. Use of these orders is growing (9000 in Chicago and 4000 in Portland in 1988). Criticism of this remedy is primarily directed at deficiencies in implementation and enforcement and not at the existence of the protective order itself. Studies sponsored by the National Institute of Justice and conducted in major cities are soon to be published. These studies are aimed at improving court procedures and enforcement of protective orders.<sup>66</sup>

The overlap of the criminal and civil processes is demonstrated by the attention given to enforcing protective orders by the California legislature. By the mid-1980s, with civil and criminal remedies in place, reformers now appeared to focus their efforts for change on the problem of enforcement. In 1984 and 1985, California passed unique laws specifically affecting the training and field practices of police officers as well as the internal administration and charging practices of prosecutors regarding domestic violence.<sup>67</sup> The statutes cover an incredibly broad range of incidents. Domestic violence, for the purposes of these Acts, is defined as causing or attempting to cause "bodily injury to, or placing . . . an adult or fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or a person with whom the suspect has had a child or has or has had a dating or engagement relationship . . . [in] reasonable apprehension of imminent serious bodily injury to herself or another."<sup>68</sup>

The purpose provision of the 1984 Act, entitled "Law Enforcement Response to Domestic Violence," reads:

The Legislature finds and declares that:

- (a) A significant number of homicides, aggravated assaults, and assaults and batteries occur within the home between adult members of families. Research shows that 35 to 40 percent of all assaults are related to domestic violence.
- (b) The reported incidence of domestic violence represents only a portion of the total number of incidents of domestic violence.
- (c) Twenty-three percent of the deaths of law enforcement officers in the line of duty results from intervention by law enforcement officers in incidents of domestic violence.

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prior-order violation from one year in jail to three years in prison. CAL. PENAL CODE § 273.6(a) (West Supp. 1991).

66. Wiener, *Inadequate Enforcement Seen on Courts' Protection Orders*, 20 CRIM. J. NEWSLETTER No. 8 at 4-5 (Apr. 17, 1989).

67. See *infra* notes 69, 75 and accompanying text.

68. CAL. PENAL CODE § 13700 (West Supp. 1991).

(d) Domestic violence is a complex problem affecting families from all social and economic backgrounds.

The purpose of this act is to address domestic violence as a serious crime against society and to assure the victims of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. It is the intent of the Legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior in the home is criminal behavior and will not be tolerated. It is not the intent of the Legislature to hold individual peace officers liable.<sup>69</sup>

Despite the legislature's explicit recognition of the complexity of domestic violence and express authorization of a continuation of individual discretion in these matters, it clearly encourages the invocation of the criminal process.

Because of the uniqueness of detailed, individual crime-focused legislation specifying the content of police training, California Penal Code section 13519 is set out in full:

Domestic violence complaints; training course and guidelines for handling; requirements

(a) The commission [on Peace Officer Standards and Training] shall implement by January 1, 1986, a course or courses of instruction for the training of law enforcement officers in California in the handling of domestic violence complaints and also shall develop guidelines for law enforcement response to domestic violence. The course or courses of instruction and the guidelines shall stress enforcement of criminal laws in domestic violence situations, availability of civil remedies and community resources, and protection of the victim. Where appropriate, the training presenters shall include domestic violence experts with expertise in the delivery of direct services to victims of domestic violence, including utilizing the staff of shelters for battered women in the presentation of training.

As used in this section, "law enforcement officer" means any officer or employee of a local police department or sheriff's office.

(b) The course of basic training for law enforcement officers shall, no later than January 1, 1986, include adequate instruction in the procedures and techniques described below:

(1) The provisions set forth in Title 5 (commencing with Section 13700) relating to response, enforcement of court orders, and data collection.

(2) The legal duties imposed on police officers to make arrests and offer protection and assistance including guidelines for making felony and misdemeanor arrests.

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69. 1984 Cal. Stat. c. 1609, § 1.

- (3) Techniques for handling incidents of domestic violence that minimize the likelihood of injury to the officer and that promote the safety of the victim.
- (4) The nature and extent of domestic violence.
- (5) The legal rights of, and remedies available to, victims of domestic violence.
- (6) The use of an arrest by a private person in a domestic violence situation
- (7) Documentation, report writing, and evidence collection.
- (8) Domestic violence diversion as provided in Chapter 2.6 (commencing with Section 1000.6) of Title 6 of Part 2.
- (9) Tenancy issues and domestic violence.
- (10) The impact on children of law enforcement intervention in domestic violence.
- (11) The services and facilities available to victims and batterers.
- (12) The use and applications of this code in domestic violence situations.
- (13) Verification and enforcement of temporary restraining orders when (A) the suspect is present and (B) the suspect has fled.
- (14) Verification and enforcement of stay-away orders.
- (15) Cite and release policies.
- (16) Emergency assistance to victims and how to assist victims in pursuing criminal justice options.

The guidelines developed by the commission shall also incorporate the foregoing factors.

(c) All law enforcement officers who have received their basic training before January 1, 1986, shall participate in supplementary training on domestic violence subjects, as prescribed and certified by the commission. This training shall be completed no later than January 1, 1989. . . .

Local law enforcement agencies are encouraged to include, as part of their advanced officer training program, periodic updates and training on domestic violence. The commission shall assist where possible.

(d) The course of instruction, the learning and performance objectives, the standards for the training, and the guidelines shall be developed by the commission in consultation with appropriate groups and individuals having an interest and expertise in the field of domestic violence. The groups and individuals shall include, but shall not be limited to, the following: one representative each from the California Peace Officers' Association, the Peace Officers' Research Association of California, the State Bar of California, the California Women Lawyers' Association, and the State Commission on the Status of Women; two representatives from the commission; two representatives from the California Alliance Against Domestic Violence; two peace officers, recommended by the commission, who are experienced in the provision of domestic violence training; and two domestic

violence experts, recommended by the California Alliance Against Domestic Violence, who are experienced in the provision of direct services to victims of domestic violence. At least one of the persons selected shall be a former victim of domestic violence.

The commission, in consultation with these groups and individuals, shall review existing training programs to determine in what ways domestic violence training might be included as a part of ongoing programs.

(e) Forty thousand dollars (\$40,000)<sup>f</sup> is appropriated from the Peace Officers Training Fund in augmentation of Item 8120-001-268 of the Budget Act of 1984, to support the travel, per diem, and associated costs for convening the necessary experts.<sup>70</sup>

This Act also mandated the implementation of written policies available to the public on request, establishing standards for the police response that would reflect domestic violence as criminal conduct "the same as" any other violent act.<sup>71</sup> Not stopping with this mandate, the legislature again took the unusual step of specifying the standards and policies for domestic violence complaints in California Penal Code section 13701.<sup>72</sup>

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70. CAL. PENAL CODE § 13519 (West Supp. 1991).

71. *Id.* § 13701.

72. (a) Felony arrests.

(b) Misdemeanor arrests.

(c) Use of citizen arrests.

(d) Verification and enforcement of temporary restraining orders when (1) the suspect is present and (2) when the suspect has fled.

(e) Verification and enforcement of stay-away orders.

(f) Cite and release policies.

(g) Emergency assistance to victims, such as medical care, transportation to a shelter, and police standbys for removing personal property.

(h) Assisting victims in pursuing criminal options, such as giving the victim the report number and directing the victim to the proper investigation unit.

(i) Furnishing written notice to victims at the scene, including, but not limited to, all of the following information:

(1)(A) A statement that, "For further information about a shelter you may contact \_\_\_\_\_." (B) A statement that, "For information about other services in the community, where available, you may contact \_\_\_\_\_."

(2) A statement informing the victim of domestic violence that he or she can ask the district attorney to file a criminal complaint.

(3) A statement informing the victim of the right to go to the superior court and file a petition requesting any of the following orders for relief.

(A) An order restraining the attacker from abusing the victim and other family members.

(B) An order directing the attacker to leave the household.

(C) An order preventing the attacker from entering the residence, school, business, or place of employment of the victim.

(D) An order awarding the victim or the other parent custody of or visitation with a minor child or children.

Data collection and recordkeeping provisions are also part of this Act. The legislation was undoubtedly influenced by the Police Executive Research Forum's 1980 report entitled *Responding to Spouse Abuse & Wife Beating*<sup>73</sup> by Nancy Loving which, like the *Challenge of Crime*,<sup>74</sup> much earlier, emphasized written policies and operational guidelines.

In 1985, the California legislature continued its unique crime-specific guide to law enforcement with the Spousal Abusers Act directed at prosecution policy and practice.<sup>75</sup> However, unlike its detailed police mandates, the legislature established a program of financial and technical assistance as a carrot to those District Attorneys' offices creating a Spousal Abuser Prosecution Program under the Act's guidelines.<sup>76</sup> This Act begins with the following "Legislative Findings":

The Legislature hereby finds that spousal abusers present a clear and present danger to the mental and physical well-being of the citizens of the State of California. The Legislature further finds that the concept of vertical prosecution, in which a specially trained deputy district attorney or prosecution unit is assigned to a case from its filing to its completion, is a proven way of demonstrably increasing the likelihood of convicting spousal abusers and ensuring appropriate sentences for those offenders. In enacting this chapter, the Legislature intends to support increased efforts by district attorneys' offices to prosecute spousal abusers through organizational and operational techniques that have already proven their effectiveness in selected

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(E) An order restraining the attacker from molesting or interfering with minor children in the custody of the victim.

(F) An order directing the party not granted custody to pay support of minor children, if that party has a legal obligation to do so.

(G) An order directing the defendant to make specified debit payments coming due while the order is in effect.

(H) An order directing that either or both parties participate in counseling.

(4) A statement informing the victim of the right to file a civil suit for losses suffered as a result of the abuse, including medical expenses, loss of earnings, and other expenses for injuries sustained and damage to property, and any other related expenses incurred by the victim or any agency that shelters the victim.

(I) Writing of reports.

In the development of these policies and standards, each local department is encouraged to consult with domestic violence experts, such as the staff of the local shelter for battered women and their children. Departments may utilize the response guidelines developed by the commission in developing local policies.

*Id.* at § 13701.

73. N. LOVING, *RESPONDING TO SPOUSE ABUSE & WIFE BEATING, A GUIDE FOR POLICE* (1980).

74. *THE CHALLENGE OF CRIME*, *supra* note 25.

75. CAL. PENAL CODE § 273.8 (West 1991).

76. *Id.* at § 273.81.

counties in this and other states.<sup>77</sup>

In addition to vertical prosecution and highly-qualified prosecutors, the legislature requires highly-qualified investigators, a vertical counselor liaison, a significant reduction in caseload, and a variety of coordination efforts with relevant community groups.<sup>78</sup> Any person arrested for the broadly defined acts specified earlier can be proceeded against by this special unit.<sup>79</sup>

"[A] district attorney shall not reject cases for filing exclusively on the basis that there is a family or personal relationship between the victim and the alleged offender."<sup>80</sup> However, extraordinary circumstances may require the reasonable exercise of prosecutorial discretion to depart from the policies of the Act.<sup>81</sup> In exercising this discretion the prosecutor must consider the number and seriousness of the currently alleged offenses.<sup>82</sup> Otherwise, subject to the diversion provisions previously indicated,<sup>83</sup> the district attorney shall: a) resist pretrial release; b) reduce the time between arrest and disposition; and c) persuade the court to impose the most severe authorized sentence.<sup>84</sup>

The current fuller enforcement trend, exemplified by the 1984 and 1985 California Acts above, originated in some of the early ABF scholarly writings, a Police Executive Research Forum report, litigation, and Minnesota research. Joseph Goldstein discussed this general issue in 1960.<sup>85</sup> He favorably described a late 1950s experiment in full enforcement by the Oakland Police Department. Despite the fact that the decision to prosecute vested pragmatically in the victims, the rate of unspecified felonious and misdemeanor assaults reported increased from 93 to 161 and 618 to 2,630 respectively between 1952 and 1956.<sup>86</sup> Ac-

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77. *Id.* at § 273.8.

78. *Id.* at § 273.82.

79. *Id.* at § 273.83. See *supra* text accompanying note 55.

80. CAL. PENAL CODE § 273.83(b) (West 1988).

81. *Id.* at § 273.85(a).

82. *Id.* at § 273.83(c).

83. See *supra* text accompanying notes 57-58.

84. CAL. PENAL CODE § 273.84 (West 1988). Elsewhere, Lisa Lerman formulated comprehensive legislation into "A Model State Act: Remedies for Domestic Abuse." Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61 (1984). For charts of all state legislation as of 1983, see Lerman & Livingston, *State legislation on Domestic Violence*, 6 RESPONSE 1 (Center for Women Policy Studies, Sept./Oct. 1983). Also, in 1984 Congress enacted the Family Violence Prevention and Services to Assist States Act, 42 U.S.C. §§ 10401-10413 (1988).

85. Goldstein, *supra* note 5.

86. *Id.* at 577-80.



cording to the Police Academy Instructor's Manual<sup>87</sup> these figures indicated "an increasing lack of respect for the laws of society by a measurable segment of our population, and a corresponding threat to the rest of the citizens of our city . . . . We recognize that the problem exists mainly because the injured person has refused to sign a complaint against the perpetrator."<sup>88</sup> The manual stated that the cause of the problem was a combination of the victim's refusal to sign a complaint against the perpetrator,<sup>89</sup> and the police's failure to "[take] advantage of the means at [their] disposal; that is, [not gather] sufficient evidence and [sign] complaints on information and belief in those cases where the complainant refuses to prosecute."<sup>90</sup>

As a result, a full enforcement policy was implemented in Oakland and coordinated with prosecutors and judges. The DA was to deny a complainant's request to drop charges and suggest it be directed to the court. The judge was then to advise that the case would not be dismissed and that perjury, contempt, or false report charges would be brought against the victim if she failed to follow through. Goldstein acknowledged that the subsequent drop of reported assaults and batteries needed follow-up evaluation to determine whether the actual number of such incidents had been reduced or only the number of reports.<sup>91</sup> Nonetheless, his conclusion in the overall theoretical context of generalized police discretion was:

The mandate of *full enforcement*, under circumstances which compel selective enforcement, has placed the municipal police in an intolerable position. . . . Legislatures, therefore, ought to reconsider what discretion, if any, the police must or should have in invoking the criminal process. . . . The ultimate answer is that the police should not be delegated discretion

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87. *Id.* at 577 n.71 (citing Police Academy, Oakland, Cal., Police Dep't Instructor's Material, Vol. 6, Bull. No. 35, Aug. 26, 1957, p. 2).

88. *Id.* at 578.

89. *Id.* at 578. "The injured person has usually refused to sign for two reasons: first, because of threats of future bodily harm or other action by the perpetrator and, secondly, because it has been a way of life among some people to adjust grievances by physical assaults and not by the recognized laws of society which are available to them." *Id.*

90. *Id.* The Police Academy Instructor's manual further stated:

The policy and procedure of gathering sufficient evidence and signing complaints on information and belief should instill in these groups the realization that the laws of society must be resorted to in settling disputes. When it is realized by many of these people that we will sign complaints ourselves and will not condone fighting and cuttings, many of them will stop such practices.

*Id.* at 578-579 (footnotes omitted).

91. *Id.* at 579-80.

not to invoke the criminal law. It is recognized, of course, that the exercise of discretion cannot be completely eliminated where human beings are involved. The frailties of human language and human perception will always admit of borderline cases. . . . But nonetheless, outside this margin of ambiguity, the police should operate in an atmosphere which exhorts and commands them to invoke impartially all criminal laws within the bounds of *full enforcement*. If a criminal law is ill-advised, poorly defined, or too costly to enforce, efforts by the police to achieve full enforcement should generate pressures for legislative action. Responsibility for the enactment, amendment, and repeal of the criminal laws will not, then, be abandoned to the whim of each police officer or department, but retained where it belongs in a democracy—with elected representatives.<sup>92</sup>

By 1970, Oakland was utilizing the Bard approach to family crisis intervention with emphasis on problem-solving and referral rather than arrest and prosecution. Preliminary statistics after three months showed significantly fewer repeat calls using this approach as well.<sup>93</sup>

LaFave held a more pessimistic view than Goldstein. He believed that the more likely effect of a continued policy of full enforcement would be a reduction in “the number of complaints when it became known that the spouse would be put in jail as a consequence of any complaint made.”<sup>94</sup> LaFave concluded that such a reduction “would not necessarily be desirable, particularly if no other agency were ready to assume the task of mediating family disputes which had been handled by the police.”<sup>95</sup>

In my first article in 1967, I also briefly discussed the two extremes of full enforcement and no response and concluded:

Neither of the two extremes in the spectrum of police alternatives in handling the domestic disturbance is practical. On the one hand, the police could choose to arrest family members and intimates for any infraction of the law in an effort to reduce the volume of these calls for service. The increase in arrests would appear to place an extremely difficult burden on the police and the courts. More importantly, such a practice fails to recognize the domestic causes of these disputes and completely ignores the value in supporting family relationships without disruption. Therefore, although complaints might decrease, the disturbances would continue unchecked behind closed doors until, in some cases, serious violence would result. Perhaps most importantly, such a full enforcement policy (control, untempered

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92. *Id.* at 586-88 (footnotes omitted).

93. *Police Discretion*, *supra* note 33, at 556.

94. W. LAFAVE, *supra* note 4, at 145-46.

95. *Id.*

by support) would undoubtedly increase the alienation of the ghetto population from the police.

On the other hand, the police might refuse to respond to domestic disturbance calls, maintaining that adjustment is not a legitimate police function. However, these calls are for immediate assistance and occur around-the-clock; they are uncertain in nature until an officer is on the scene; they often involve the need for apparent authority; and they sometimes require the actual use of legitimate force and other traditional police sanctions.<sup>96</sup>

Ten years later, however, I switched my emphasis from adjustment to invocation of the criminal law by arrest.<sup>97</sup> The reasons for such a switch are as follows:

In the last ten years recognition of the peace-keeping role of the police and the exorbitant amount of criminal justice agency time spent on relatively minor family disputes has led to systematic attempts to deal with this problem. . . . The compassion and humanity of the social services has been increasingly interjected to effect more organized and 'knowledgeable' efforts at diversion, counseling, referral, mediation and treatment. . . . The trouble with such a trend for inter-spousal violence *now* is that the juvenile and adult processes, in the United States at least, confronted with intolerable rates of delinquency and criminality, have recently been discarding and rethinking the commendable, but still unproven, facets of models based on sickness, treatment and rehabilitation, and have been returning to the known entities of accountability for bad acts, with appropriate and acknowledged punishment, enlightened and softened somewhat by prior experience with the social services.<sup>98</sup>

Using Frank Allen's classic 1964 analysis<sup>99</sup> of the "problems of socializing criminal justice" with regard to other incidents on "the borderland of the criminal law" to answer the central question regarding an appropriate process response for intrafamily violence, I concluded:

Efforts at therapy can, and I suppose should, be included in the process but should not be given undue emphasis, for there is simply no evidence that we know how to diagnose, much less treat, disputants' problems in a manner that will prevent repetition. Simply put, we must go with what we know. And we know that we cannot ignore or condone acts or threats of imminent violence. We know that the police are best equipped to protect others and

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96. *Police Response*, *supra* note 33, at 948 (footnotes omitted).

97. *The Relevance of Criminal Law*, *supra* note 33. This paper was first presented at the Second World Conference of the International Society of Family Law in Montreal.

98. *Id.* at 188-189.

99. Allen, *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, in *THE BORDERLAND OF CRIMINAL JUSTICE* (1964).

themselves. We know how to punish, whether by fine, incapacitation, other denials of full liberty, embarrassment, inconvenience, etc. And we know punishment is a clear statement of the personal responsibility of the offender and the condemnation and retribution of society. We also know that where punishment is to be imposed, the criminal process provides the best safeguards that such punishment is imposed on the appropriate person under the most adequate circumstances. We know that incapacitation prevents repetition during the period of incarceration. Finally I submit that we are increasingly coming to believe that punishment, quickly, fairly, proportionately and appropriately imposed, may deter or reduce the quality and quantity of some kinds of bad conduct at least as well, if not better, than attempts at speculative therapy, and thus may serve the rehabilitation function even better from the perspective of non-repetition.

....

Thus the criminal law, the police, the prosecutor and the courts should not only continue to respond to incidents of inter-spousal violence, but should emphasize the importance of the traditional response of arrest, prosecution and sanction as a sign of public disapprobation and protection, not only at the upper levels of violence, but also at the first minimal signs of trouble.<sup>100</sup>

At the prosecution level,<sup>101</sup> many in 1978 at the Center for Women's Policy Studies and the National DA's Association Family Violence Conference in Memphis urged fuller enforcement. "No drop" policies, however, are considerably more controversial among domestic violence reformers than is mandatory arrest, probably because its onus falls more on the alleged victim. For example, in a few instances, uncooperative complainants have arguably been victimized a second time by being held in contempt and jailed for refusing to testify. The arguments against "no drop" policies by many proponents of mandatory arrest illustrate both the complexity and variety of domestic violence incidents and the gender politics surrounding the ongoing reforms in this area over much of the last two decades. For example:

In family violence cases, the pressure not to prosecute can be overwhelming. Many battered women face verbal harassment and intimidation not to press and pursue charges, and the threat of further physical violence, even murder, if they do. Given the alarmingly high rates of spousal homicide, these fears are legitimate. Sometimes a battered woman drops charges against her husband because he pleads with her not to carry through with prosecution, promising not to hurt her again. Hoping that he will keep that

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100. *The Relevance of Criminal Law*, *supra* note 33, at 190-191.

101. For a recent article on prosecutorial discretion in spouse abuse cases, see Schmidt & Stevry, *Prosecutorial Discretion in Filing Charges in Domestic Violence Cases*, 27 *CRIMINOLOGY* 487 (1989).

promise, she may decide to give him another chance. Many battered women fear that their husbands will be jailed if they proceed with prosecution. Concern about loss of financial support if their husbands are incarcerated, fear of family reprisal, and a wish to save face in the community by settling the dispute as quietly as possible, all act as deterrents to pursuing criminal prosecution.

....

Some argue that any policy that denies victim discretion is patently offensive. Others oppose no-drop policies on the grounds that they are not effective. They believe that a stricter criminal justice response will not solve the problem of family violence and that efforts toward that end should focus on eradicating sexism in society and educating people on safe and healthy ways to resolve conflict. Most proponents of no-drop policies argue that while victims should not be incarcerated for failure to cooperate with the courts, these policies should be supported because they promote prosecution of abusers and therefore protect family victims.

No-drop policies are frequently combined with non-punitive disposition options that mandate counseling for abusers in the hope that this will not only be an effective form of intervention but one more acceptable to their victims. The penalties are frequently tailored to respond to the victim's objectives in order to secure their cooperation.<sup>102</sup>

If charges are brought and not dismissed, what is the effect of judicial intervention? One National Institute of Justice study reported that only fifty percent of such cases resulted in conviction, and one-third of these victims suffered renewed abuse within two to three months.<sup>103</sup> Nevertheless, because the re-arrest rate was only ten percent, and the arrest outcome satisfied more than half of the victims, researchers reached the conclusion that judges play a critical role in deterring future violence in two ways: "First, judicial warnings and/or lectures to defendants concerning the inappropriateness and seriousness of their violent behavior apparently improved the future conduct of some defendants. Second, judges occasionally counseled victims by telling them that they should not tolerate violent abuse and/or suggesting counseling programs."<sup>104</sup>

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102. "No-Drop" Prosecution Policies Sometimes Backfire Against Victims, 7 RESPONSE 1, 5-6 (Center for Women Policy Studies, May/June 1984).

103. *Courts' Response to Battered Women Evaluated*, 7 RESPONSE 4, 4 (Center for Women Policy Studies, March/April 1982) (citing B. SMITH, NON-STRANGER VIOLENCE: THE CRIMINAL COURTS' RESPONSE (National Institute of Justice, U.S. Dept. of Justice 1983)).

104. *Id.* at 10 (quoting B. SMITH, NON-STRANGER VIOLENCE: THE CRIMINAL COURTS' RESPONSE (National Institute of Justice, U.S. Dept. of Justice 1983)).

The study postulates that the judges' conduct is especially critical to those individuals, both victims and defendants, who appear in court for the first time, and suggest that the effects

One of the two most important causes of the full enforcement trend of the 1980s is the growth of litigation about the issue, much of which has been fostered by battered wives advocates.<sup>105</sup> Increasingly, victims of domestic violence have attempted to sue police departments, and through them municipalities, alleging, among other things, that inadequate police protection was responsible for their injuries. Until the mid-80s, most of these suits were grounded in tort law. However, more recent cases have involved claims of violations of constitutional rights. In the earlier cases, the plaintiffs' proposed basis for recovery was the city's negligence in failing to provide reasonable protection for victims of domestic violence. The two main legal obstacles to recovery were (1) sovereign immunity, which shielded the city, and (2) the police's duty of protection to society as a whole, but not to individual citizens. Sovereign immunity has gradually eroded.<sup>106</sup> But without a breachable duty, no cause of action for negligence could exist. A series of New York cases created a loophole through this second barrier.

In *Baker v. City of New York*,<sup>107</sup> the court held that the existence of a judicial protection order puts the police on notice that the named individual has a special need for protection. This notice creates a special duty of care owed by the police toward that individual. Although the police do not normally owe a duty of protection to specific individuals, the notice provided by a protection order can create such a duty.

In *Bruno v. Codd*,<sup>108</sup> twelve battered women sued the New York City Police Department, alleging that the police refused to assist them or to arrest their husbands solely because the parties were married. Plaintiffs and defendant entered into a consent judgment requiring police to respond as soon as possible to all domestic calls in which a protection order violation is reported.

Perhaps the most important of the New York cases was *Sorichetti v. City of New York*.<sup>109</sup> A mother and daughter, who were both physically

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of a judge's conduct on the cessation or resumption of violence is a topic worthy of further study.

*Id.*

105. The other most important cause is the Minnesota research. See *infra* notes 147-54 and accompanying text.

106. According to Mayhew, over 30 states have at least partially waived immunity. Mayhew, *The Abrogation of Sovereign Immunity in Mississippi: The Legislative Problem*, 3 MISS. C. L. REV. 209, 220-23 (1983).

107. 269 N.Y.S.2d 515, 25 A.D.2d 770 (N.Y. App. Div. 1966).

108. 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (N.Y. 1979).

109. 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (N.Y. 1985).

abused by their husband/father, sued the City of New York for inadequate police protection which resulted in serious injuries to the daughter. The woman had previously obtained a protection order against her husband, but the courts had granted the husband visitation rights with their daughter on weekends. While picking up his daughter from the police station (as the order required) for his weekly visitation, the husband uttered death threats against both his wife and daughter. The wife, who was present, immediately reported the threats to the desk officer, but the police refused to arrest the husband or to take any other action. During that weekend visitation, the husband severely injured his daughter. The New York Court of Appeals, applying *Baker*, held that the mere existence of the protection order established a special duty owed by the police toward the mother because she was named in the order, but did not alone create a duty toward the daughter, who was not named in the order.<sup>110</sup> However, the court further held that the combination of the protection order, the Police Department's knowledge of the husband's violence, and the wife's reasonable reliance on the police to take action created a special duty that extended to the daughter.<sup>111</sup> The duty created by a protection order, however, is not a duty of mandatory arrest but a duty to investigate and to take appropriate action.<sup>112</sup>

Many states now have mandatory arrest provisions,<sup>113</sup> and some courts have ruled on their enforcement. The Oregon Supreme Court, in *Nearing v. Weaver*,<sup>114</sup> held that police could be held liable for emotional stress caused by their failure to enforce a protective order under the mandatory arrest provision of the State's Abuse Prevention Act.<sup>115</sup> The court buttressed this holding by ruling that because the determination of probable cause was not discretionary, the defense of police immunity from prosecution did not apply.<sup>116</sup>

The constitutional cases have been based on two theories: (1) "due process"—the police's failure to provide adequate protection from physical abuse violates the battered wife's fourteenth amendment right not to be deprived of liberty without due process of law; and (2) "equal protec-

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110. *Id.* at 469, 482 N.E.2d at 75, 492 N.Y.S.2d at 596.

111. *Id.*

112. *Id.*

113. *See, e.g.*, WASH. REV. CODE § 10.99 (1989); WIS. STAT. § 968.075 (1989); *see also* Lerman & Livingston, *supra* note 84.

114. 295 Ore. 702, 670 P.2d 137 (Or. 1983).

115. *Id.* at 708, 670 P.2d at 141.

116. *Id.* at 710, 670 P.2d at 142.

tion"—policies, customs, or practices of non-intervention or of lessened intervention in spousal abuse cases than in other assault cases discriminates against a class of people by gender and marital status without a compelling state interest in doing so.

The key opinion in this line of cases is *Thurman v. City of Torrington*.<sup>117</sup> Following a particularly vicious attack, a mother and her son sued the city and police for failing to respond adequately to repeated assaults by the husband. The plaintiffs alleged violation of the equal protection clause because police consistently and systematically failed to provide protection to victims of domestic violence. The plaintiffs won a 2.3 million dollar verdict. The district court held that the behavior clearly resulted from a sex-based classification, and that the city must put forth an important governmental interest for discriminating against women who are victims of domestic violence. The court stated that a man may not physically abuse a woman solely because she is his wife. Therefore, the court reasoned, a police officer may not knowingly refrain from intervention or arrest solely because the victim and offender are married to each other.

However, according to Amy Eppler,<sup>118</sup> *Thurman* was decided on the easier issue of sex discrimination. The court avoided having to decide "the harder case"—an allegedly gender-neutral policy of police nonintervention in family matters. Thus, the equal protection clause has not yet been applied to such a policy, and it is uncertain how it will be in future cases. Eppler submits that standards laid down by other U.S. Supreme Court decisions (unrelated to domestic violence) will make it difficult to prove that such a policy is unconstitutional.<sup>119</sup> It would not be enough to show that the policy harms women more than it does men, or that such inequality was foreseeable to policymakers. The plaintiff would need to prove discriminatory intent, that is, that lawmakers enacted or reaffirmed the policy at least partly because of the inequality in harm produced.

In *Bartalone v. County of Berrien*,<sup>120</sup> a federal district court in Michigan further delineated *Thurman's* equal protection ruling. The plaintiff's husband physically abused her and also threatened her life. She

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117. 595 F. Supp. 1521 (D. Conn. 1984). The 1989 TV movie "Cry for Help" was a reenactment of this case.

118. Eppler, *Battered Women and the Equal Protection Clause*, 95 YALE L.J. 788 (1986).

119. *Id.* at 795.

120. 643 F. Supp. 574 (W.D. Mich. 1986).



reported this to a police officer, told him the make of her husband's car and his place of work, and asked the officer to arrest him. The officer told the plaintiff he would arrest her husband on the pretense of a traffic violation. However, the officer failed to take any action at all. Two weeks later, the plaintiff's husband shot and wounded the plaintiff and then killed himself. The plaintiff sued the officer, the police chief, and the township for, *inter alia*, violation of her constitutional right of equal protection of the law.

The court held that the equal protection clause requires police officers and agencies who are under affirmative duty to protect persons within their area to fulfill that duty without intentionally discriminating against persons on an irrational basis. Thus, police officers may be liable if they have an affirmative duty and consciously breach it in a discriminatory fashion; cities may be liable if they promulgate a broad policy with at least partly discriminatory intent.

The court found that the complaints stated a cause of action against the patrolman and also the police chief because of allegations of a conscious choice not to promulgate or enforce a policy of intervention in spouse-abuse cases. However, as to the complaint against the township, the court held that to state a claim of municipal liability, a plaintiff must allege facts showing a broad municipal policy rather than just an isolated action by a single non-policy-making wrongdoer.

The "due process" approach was tried along with the tested "equal protection" approach in *Dudosh v. City of Allentown*.<sup>121</sup> *Dudosh* involved a suit brought by the administrator of the estate of a woman killed by her live-in boyfriend who later committed suicide. The defendants were the city and two police officers. Plaintiff claimed that the defendants violated the decedent's constitutional rights of due process and equal protection, and in a pendent state claim, that the police officers acted with malice and willful misconduct in the manner in which they handled the decedent's requests for assistance. Eleven days before the murder, decedent complained to the police that her former live-in boyfriend, against whom she had obtained a protection order, had attempted to enter her apartment and had threatened to kill her. The responding officer filed a report to be turned over to a police detective for further investigation. However, no investigation took place. A memo filed by the detective receiving the report stated that no follow-up on the matter

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121. 665 F. Supp. 381 (E.D. Pa. 1987).

should take place because of department policy "not to get involved in matters of this nature."<sup>122</sup> The memo further stated that in most of these matters the couples reunite anyway.<sup>123</sup>

The court granted summary judgment for defendant with respect to the due process claim.<sup>124</sup> The court explained that due process only prohibits affirmative acts by government to deprive a person of life, liberty, or property. It does not require government to guarantee citizens' life, liberty, or property against private actors. Thus, inadequate police protection is not a denial of due process.<sup>125</sup> However, with respect to the equal protection claim, the court denied summary judgment for the defendants.<sup>126</sup> The court stated that although a city had no constitutional duty to provide police protection, it must provide such service in a non-discriminatory fashion if it does choose to do so.<sup>127</sup> The court also held that a city may violate the equal protection clause merely by acquiescing and failing to sanction employees for discriminatory conduct of which city policymakers are aware.<sup>128</sup>

The due process claim fared better in one of only two domestic violence lawsuits against police to be decided by a federal circuit court of appeals at least through 1988. In *Balistreri v. Pacifica Police Dept.*,<sup>129</sup> a battered wife in California sued a city and its police, claiming they had denied her due process. The plaintiff repeatedly called police after suffering beatings and harassments by her husband. The police refused to arrest or to investigate. On one occasion, when plaintiff's estranged husband fire-bombed her house, the police took forty-five minutes to respond to her 911 phone call. Police ridiculed plaintiff and tried to pressure her not to press charges against her husband. Once they hung up on her as she tried to report a vandalism by her husband.

The federal district court dismissed her claim. The Ninth Circuit Court of Appeals reversed, holding that failure to respond to the husband's continued threats, harassment, and violence implicated the wife's right to be free from physical harm and restraint, a denial of her right to liberty under the due process clause. The court further stated that the

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122. *Id.* at 385.

123. *Id.*

124. *Id.* at 391.

125. *Id.* at 388.

126. *Id.* at 394.

127. *Id.* at 392.

128. *Id.* at 395.

129. 855 F.2d 1421 (9th Cir. 1988) (as amended 1990).

complaint suggested an equal protection claim as well, and granted the plaintiff leave to amend her complaint to include this claim expressly.

The other case decided by a U.S. circuit court of appeals is *Watson v. City of Kansas City, Kansas*.<sup>130</sup> In that case, the Tenth Circuit held that, "[a]lthough there is no general constitutional right to police protection, the state may not discriminate in providing such protection."<sup>131</sup> The court also held that in an equal protection suit, the plaintiff has the burden of proving discriminatory intent, but that such intent need not have been the sole purpose for the defendant's challenged actions.<sup>132</sup> A plaintiff need only prove that a discriminatory intent was a motivating factor.

The Supreme Court has not addressed these issues dealing with domestic violence. However, a recent case may have important implications. In *City of Canton v. Harris*,<sup>133</sup> the Supreme Court held that a municipality may be held liable under 42 U.S.C. § 1983 when failure to train its police officers results in violations of constitutional rights.<sup>134</sup> However, in order for the city to be liable, its failure to train must result from municipal policy, and this policy must have been the product of "deliberate indifference" to the rights of the city's residents.<sup>135</sup> In other words, it is not enough to establish that a police officer's lack of training results in an unconstitutional injury (i.e. denial of due process or equal protection). A plaintiff must also prove that it was the city's policy not to train its officers adequately in the protection of that constitutional right. Thus, inadequate training due to administrative error or laziness does not make the city liable for constitutional infringement. The plaintiff must also prove that the city's policy was made in deliberate indifference to citizens' rights. Thus, inadequate training caused by tight budget constraints alone probably could not impose section 1983 liability. Probably nothing short of a deliberate city decision not to train its officers to respect the constitutional rights of citizens, made with reckless disregard for such rights and with the strong probability that such rights will be infringed, would pass the *Harris* test for section 1983 liability. Despite the possibilities inherent in this case, the court seems concerned with avoiding the exposure of municipalities to "unprecedented liability." It

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130. 857 F.2d 690 (10th Cir. 1988).

131. *Id.* at 694.

132. *Id.*

133. 109 S. Ct. 1197 (1989).

134. *Id.* at 1200.

135. *Id.* at 1204-05.

therefore avoids requiring the federal court system to "second-guess" municipal employee training programs and avoids raising "serious questions of federalism" by intruding into local allocative and administrative decisionmaking.

These are but a few of the reported cases beginning almost exclusively in the 1970s. Many more are unreported, settled on the basis of this growing judicial support for fuller enforcement of the criminal law, at least at the police stage.

Litigation in a directly related area created an ironic twist to the fuller enforcement of the laws against some acts of domestic violence by providing for dismissals, acquittals, or arguably too lenient sentences for other acts of domestic violence. These cases almost always involve domestic violence against men, and involve the concept of the Battered Woman's Syndrome, popularized by Lenore Walker in her writings<sup>136</sup> and her testimony in *Ibn-Tamas v. United States*.<sup>137</sup> The Battered Woman's Syndrome has been used in court either directly through the admissibility of expert testimony<sup>138</sup> and instructions, or indirectly through counsel's

136. L. WALKER, *THE BATTERED WOMAN* (1979); L. WALKER, *THE BATTERED WOMAN SYNDROME* (1984); L. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989).

137. 407 A.2d 626 (D.C. 1979).

138. For example, in *People v. Aris*, 215 Cal. App. 3d 1178, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989), the court held:

[I]t was error not to permit Dr. [Lenore E.] Walker to testify, based on her experience and BWS theory, as to how the defendant's particular experiences as a battered woman affected her perceptions of danger, its imminence, and what actions were necessary to protect herself. . . . [However,] no matter what the expert testimony, it is not reasonably probable that a jury would find defendant actually believed she was in imminent danger. . . . We find that a different verdict was not reasonably probable if the erroneously excluded testimony had been admitted.

In addition, Assembly Bill 2613 was introduced in the California Assembly on January 16, 1990, by Assemblyman Jerry Eaves. It provides:

SECTION 1. The Legislature finds and declares all of the following:

(a) Domestic violence and sexual abuse are serious crimes against society.

(b) Existing statutes may exclude relevant evidence of the mental, emotional, or physical impact of abuse in a domestic relationship.

(c) The policy of the state shall be to assure victims of domestic violence the maximum protection from abuse by fully considering the physical, emotional, or mental effects of domestic violence upon the victim.

(d) The purpose of this act is that all relevant evidence be admitted that would tend to establish the presence or absence of physical, emotional, or mental effects upon the perceptions or behavior of the victims of such violence, including civil or criminal actions where self-defense or defense of others is at issue.

SEC. 2. Section 1107 is added to the Evidence Code, to read:

1107. (a) In any action, testimony is admissible regarding the effects of abuse on the behavior, beliefs, or perceptions of persons in a domestic relationship, including expert

questions and argument. Under the theory, attorneys argue that the injury or death caused by the defendant was either justified or ameliorated by (1) a past history of abuse by the injured against the defendant, and (2) the sociological, psychological, and economic condition of the defendant at the time of the incident.

Media accounts of this paradox are replete with examples. For instance, United Press International reported that an Oklahoma City attorney, D. C. Thomas, won an acquittal for his client who had hired a hitman to kill her husband. The husband had abused the defendant for years, sometimes at gunpoint, and had threatened to kill her if she left him. Thomas was quoted as saying: "Ten years ago such a defense was never even discussed. In the past five years the defense of homicide cases involving battered women has totally changed. It's been so dramatic."<sup>139</sup> These cases strain to the limit long-standing definitions of self-defense, graphically illustrate the very important concept of jury nullification, and point out the need for controlled judicial sentencing discretion.<sup>140</sup>

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testimony and descriptions of the experiences of battered women, unless it is otherwise inadmissible under this code.

(b) The following definitions shall govern this section.

(1) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in actual apprehension of serious bodily injury to himself, herself, or another.

(2) "Domestic relationship" means family or household member, parent, or other relationship as defined in Section 1037.7.

Assembly Bill, 2613, Cal. Leg., Reg. Sess. 1-2 (1990).

139. Bond, *'No Other Way Out': The Battered Woman's Syndrome Why Juries Acquit Some Women Who Kill*, (copy on file with author). In two earlier reported cases, two battered wives were convicted of hiring "hitmen" who subsequently killed their husbands. But, as an additional indicator of change, after serving nine years of a 40-year sentence and six years of a 20-year sentence, each was commuted to time served by Illinois Governor James Thompson. Thompson said the decedents' violence did not excuse the murders but did explain their wives' motives and therefore they had been punished enough. "Debate Stirs on Lenient Treatment of Women Who Turn to Murder." L.A. Daily Journal, Feb. 7, 1989, II p. 1, cols. 1-2.

140. For example:

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Last month, a Long Beach jury decided the 28-year-old mother of three killed her husband in self-defense. The verdict has sparked heated debate.

Domestic violence experts believe the verdict to be the first time in Los Angeles County, and possibly California, that a woman has been acquitted of murder using a defense based on the "battered wife syndrome."

The law requires that there be "imminent danger" to justify killing in self-defense. What made Robin Elson's case unusual is that she shot her husband three times in the back while he sat in his chair, possibly asleep or passed out from vodka.

The controversial verdict has been hailed by women's rights advocates as long-overdue recognition of the battered woman's mental state.

Her defenders say Robin Elson was trapped — that she was taught through years of punching and berating, from window screens nailed shut and doors barricaded with heavy

Clearly the politics of gender are once again involved—this time in the controversy over the appropriate role, if any, of the Battered Woman Syndrome in the criminal justice process. For example, syndicated columnist Ellen Goodman bemoaned the fact that when husbands and boy-friends kill their wives or girlfriends they reportedly serve only an average of two to six years in prison, because the victim's precipitation causes allegedly lenient sentences. Ironically, a female friend of one female victim is quoted by Goodman as saying: "We have a right to expect zero tolerance toward domestic violence . . . . There is no acceptable excuse. Not alcohol. Not adultery. There's no provocation for murder."<sup>141</sup>

On the research side, a report and an experiment conclude this lengthy outline leading to the current emphasis on fuller enforcement of the criminal law regarding domestic violence. In 1979 the Police Executive Research Forum (PERF) visited seventeen police departments, interviewed fifty police officials, administered 130 patrol officers' questionnaires, and solicited written police procedures and training materials concerning policing of incidents of adult, intrafamily abuse. A report by Nancy Loving was published in 1980 as the result.<sup>142</sup> As earlier mentioned, the text of the report itself recommends upgrading written policies, procedural guidelines, and training, without any clear explicit emphasis on mandatory or even fuller arrest. However, a brief executive summary, and a preface by the PERF President, Bruce Baker, Chief of Police, Portland, Oregon, arrive at an interestingly different emphasis of the study. Both cite the occurrence of class action suits, consent decrees, new legislation and other pressures on spouse abuse policing. They also

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furniture, from the two times she tried to escape and the two times her husband found her — that she could no more leave her house than fly to the moon.

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But prosecutors have denounced the verdict.

"Is this a signal that men who get frustrated by the actions of their wives can kill them? That whenever we get frustrated with someone we are entitled to exact the ultimate sentence — death?" said Denis Petty, head deputy district attorney in Long Beach.

Juries typically have rejected the argument that a woman is in imminent danger if her abusive mate is at rest, partly because expert testimony about the battered wife syndrome has been excluded by some judges as irrelevant and restricted by others, the experts say.

Domestic violence experts estimate that less than 1 percent of battered women kill their husbands. Those who do "don't get off easily," said Nancy Kaser-Boyd, a psychologist who testified at Elson's trial.

*Abused Wife's Acquittal in Killing Sparks Debate*, Sacramento Bee, Dec. 28, 1989, at B-5, col. 1.

141. Goodman, *The 'She-Deserved-It' Defense at Work*, St. Louis Post-Dispatch, May 23, 1989, at 9D, col. 1.

142. N. LOVING, *supra* note 73.

point out that researchers held "extensive discussions with academics, psychologists, women's rights advocates, and other non-police personnel involved with the issue of spousal violence."<sup>143</sup> The Executive Summary then concludes, somehow:

[t]he traditional police response to these calls, emphasizing crisis intervention skills and reconciliation of the parties, is inappropriate and unhelpful in cases involving serious injury or repeated abuse, nor is it effective in reducing the number of spouse abuse cases. In fact, it may aggravate the problem by suggesting to assailants that their violent behavior can be overlooked.<sup>144</sup>

Chief Baker's remarks in the Preface are much more pointed.

In cases involving intentional use of force resulting in serious injury, use of a deadly weapon, and/or violation of a restraining order, the report recommends arrest . . . . The report's emphasis on arrest in felony cases and in some misdemeanor assault cases may disturb police administrators who place a high value on officers' discretion over the disposition of a case . . . . In fact, officer discretion is preserved because officers must assess each situation. . . . The large number of repeat calls in spousal violence cases suggests that traditional police methods for handling them are ineffective.<sup>145</sup>

To his credit, Chief Baker concludes: "Further research is needed to test the validity of this approach and to determine the impact of police actions in a variety of spousal conflicts."<sup>146</sup>

The research that most influenced the fuller enforcement trend of the eighties was the Minneapolis Domestic Violence Experiment.<sup>147</sup> The experiment tested three types of responses to misdemeanor-assaults: arrest, advising and counselling the parties (or negotiating the dispute), and separating the parties by ordering the assailant to leave.<sup>148</sup> Police patrol officers participating in the experiment used one of the three responses, determined by a random selection process, for each domestic disturbance case they handled. A research staff worker made a follow-up visit to the victim, followed by telephone interviews every two weeks for twenty-four weeks, to see if violence had recurred.<sup>149</sup>

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143. *Id.* at xi.

144. *Id.* at xvi.

145. *Id.* at xi.

146. *Id.* at v.

147. First reported in Sherman & Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

148. Sherman & Berk, *The Minneapolis Domestic Violence Experiment*, in MINNEAPOLIS POLICE AND LAW ENFORCEMENT IV 331, 335 (R. Homant & D. Kennedy, eds. 1987).

149. *Id.* at 337-338.

Any research project is subject to design, methodological, and evaluative criticism, as well as the problems of monitoring and human error. This project was certainly no exception.<sup>150</sup> However, most commentators seemed to accept the results, based on both department records and a victimization survey, that arrest resulted in about half the repeat violence rate of the other responses.<sup>151</sup> Those arrested typically were held overnight in jail and then released. Only three of the 136 arrested received a formal judicial sanction.<sup>152</sup>

Homant and Kennedy acknowledged that "the [Minnesota] experiment is not totally immune to criticism" (citing, for example, that twenty-eight percent of the cases derived from just three of forty-one officers involved) but like most, they nonetheless generally accepted the results. However, they offered a well balanced analysis, introducing a chapter on the subject by the researchers, Sherman and Berk, in their book, *Police and Law Enforcement*:

We are reasonably convinced that in this particular case arrest did produce a significant deterrent effect. This, we feel, places a strong burden of proof on any who would support the crisis intervention model to the exclusion of a law enforcement model for dealing with spouse abuse.

The better approach, however, may be to try to find common ground for

150. See, e.g., Elliott, *Criminal Justice Procedures in Family Violence Crimes*, in FAMILY VIOLENCE, *supra* note 1, at 453-458.

However, to his credit, at least one of the primary researchers acknowledges a wide range of possible "limitations" of his research including "Internal Validity" concerns of 1) "Randomization," 2) "Differential Victim Reporting by Treatment," 3) "Sample Size," 4) "Analysis," 5) "Follow-Up Period," and 6) "Displacement," as well as "External Validity" issues of 1) "Jail Time," 2) "Mediation Quality," 3) "Interaction of Interview and Arrest," 4) "Absence of Theory," 5) "Victim Perception of Officer," 6) "City Context," and 7) "Alternative Procedures." He admits that this "list of possible threats to the internal and external validity of the 'arrest-works-best' finding is clearly quite extensive." However, he concludes that "the Minneapolis experiment actually suffered quite minor threats to validity" in comparison with most other policy studies and randomized experiments. In support of his research and the publicity he actively sought for it, he states:

"[T]he appropriate test is a comparison of the evidentiary strength of the recommendations derived from the Minneapolis experiment with the strength of the evidence in support of the pre-experiment status quo." Sherman and Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 LAW & SOC'Y REV. 117, 129-34 (1989).

151. Sherman & Berk, *supra* note 148, at 342-43.

	Repeats Within 6 Months		
	Arrest	Advise	Send D Away
Official Records	10%	19%	24%
Victimization Survey	19%	37%	33%

*Id.*

152. *Id.* at 344.



the two models. Sherman and Berk found that arrest plus "listening" was much more effective than simple arrest. They also concede that their "advise" condition did not make use of any special training programs or referral resources.

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While some increase in the typical level of arrest is certainly called for, research is needed to try to determine the optimum balance between an arrest and a crisis intervention response.<sup>153</sup>

Interest in and criticism of the Minnesota experiment has led to research, funded by the National Institute of Justice, in Omaha, Miami, Atlanta, Charlotte, Milwaukee, and Colorado Springs. Not only do these replicate the Minnesota experiment, but they expand the kind of police alternatives used and the length of the follow-up period. Although the results for most are not available, the Final Report of the Omaha Domestic Violence Police Experiment casts substantial doubt on what generalizations can be derived from the Minnesota project:

Given the strength of the experimental design used in Omaha and the absence of any evidence that the design was manipulated in any significant way, the inability to replicate findings associated with the Minneapolis Experiment calls into question any generalization of the Minneapolis findings to other sites. First, arrest in Omaha, *by itself*, did not appear to deter subsequent domestic conflict any more than separating or mediating those in conflict, i.e., arrest and the immediate period of custody associated with arrest, was not the deterrent to continued domestic conflict that was expected. If the Omaha findings should be replicated on the other five sites conducting experiments on this issue, policy based on the presumptory arrest recommendation coming out of the Minneapolis Experiment should be reconsidered. Second, while arrest, by itself, did not act as a deterrent to continued domestic conflict for the misdemeanor domestic assault cases coming to the attention of the Omaha police, neither did it increase continued domestic conflict between parties to an arrest for assault. . . . Arrest, therefore, did not appear to place victims in greater danger of increased conflict than did separation or mediation. It would appear that what the police did in Omaha *after* responding to cases of misdemeanor domestic assault (arrest, separate, mediate) neither helped nor hurt victims in terms of subsequent conflict.

The failure to replicate the Minneapolis findings will undoubtedly cast some doubt upon the wisdom of a mandatory or even a presumptory arrest policy for cases of misdemeanor domestic assault. At this point, we are in

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153. *Id.* at 332.

the awkward position of having conflicting results from two experiments and no clear, unambiguous direction from the available research on this issue. . . .

Notwithstanding the unequivocal need to await the findings from each of the five other replications of the Minneapolis Experiment before considering the generalizability of findings beyond the sites involved, a discussion of the policy implications of the Omaha police experiments for the City of Omaha seems appropriate. . . .

1. Non-Arrest Policy. Since arresting suspects is expensive and conflicts/assaults do not appear to increase when arrests are *not* made, one response to these data might be a recommendation to effect informal dispositions (separate or mediate) in cases of misdemeanor domestic assaults in Omaha. In this manner the costs associated with taking officers out of service, transporting suspects, bookings, jail, etc. would be avoided. A significant problem with this approach, however, is that it seems ethically inappropriate, it violates the recommendations of the Attorney General's Task Force on Family Violence . . . and it may be illegal . . . to patently ignore the rights of victims. What can be said to justify a legal system wherein victims have little protection from violent behavior that is against the law? That the issue is complex and not given to simplistic solutions is a given . . . that domestic assault should be ignored when known to the authorities is not . . .

2. Non-Mandatory Arrest Policy. . . . A policy that encourages, but does not mandate arrest may be useful from several points of view. First, it would allow officers in Omaha to respond to the wishes of victims who do not want, for a variety of reasons, suspects arrested. . . . Second, when an arrest is seen as an entry point into a coordinated criminal justice system rather than an end point, it may shift the burden of deterrence from a single official police intervention (arrest) to a sequence of other interventions, each of which may have some salutary effect. This view recognizes that suspects chronically involved in domestic violence most frequently do not admit to having a problem in this regard . . . are not easily treated . . . and do not seek help voluntarily . . . to deal with such problems and thus might require sustained long term interventions to change their ways. It supports arrest in domestic assault instances in which probable cause for an arrest is present and when victims support the arrest of suspects, not because arrest is a panacea for deterring domestic violence, but because of the penalties and the *leverage* that an arrest implicitly facilitates. . . .

It should be made clear again, that the selection of either, or some variation, of the above policies is probably dependent upon the ends desired. If cost is the sole criteria, a policy of mediating or separating couples in conflict would not be inconsistent with the findings from the Omaha replica-

tion. If, however, there is an interest in trying to use the weight of the criminal justice system in Omaha to impact the incidence of domestic violence, the adoption of a policy that encourages, but does not mandate arrest for misdemeanor domestic assaults would also be consistent with the Omaha findings. It is important to remember that neither of the policies discussed here are enjoined by the findings for the Omaha experiment. . . . It is clear, however, that arrest, by itself, was not effective in reducing or preventing continuing domestic conflict in Omaha, and that a dependence upon arrest to reduce such conflict is unwarranted, perhaps erroneous and even counterproductive.<sup>154</sup>

Reform of rape laws and procedures has had a parallel history with this domestic violence chronicle, again primarily due to victims' and women's rights pressure. And again the popular media has come to their aid with a deluge of materials. Marital rape, and lately date rape, have been spotlighted. Since the mid-seventies most states have altered their laws in this area in some respect. Many states have eliminated or at least narrowed spousal exemption laws.<sup>155</sup> Thus police, prosecutor, and judicial policies, guidelines, and training have been introduced or reformed with emphasis on fuller enforcement of the law. Some states have restricted the prejudicial cross-examination of victims and have made other relevant evidentiary changes.<sup>156</sup> While these changes have clearly sensitized the public and the legal process to the plight of the victim, they have also reduced, if not eliminated, the import of the relationship context on the one hand, and staunch defense views of the meaning of sixth amendment cross examination rights on the other.

Concern for elderly abuse, reflected in crime specific laws, also resulted in part from the attention directed at spousal abuse as well as domestic violence in its totality.<sup>157</sup>

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154. F. DUNFORD, D. HUIZINGA & D. ELLIOTT, FINAL REPORT: THE OMAHA DOMESTIC VIOLENCE POLICE EXPERIMENT 61-67. (Submitted to the National Institute of Justice and the City of Omaha - June 1989). The Milwaukee replication is "expected to show the same results" as the Omaha Report. Milwaukee, like "about 20% of the nation's medium to large cities, ha[s] mandatory arrest laws or policies" as a "direct result" of the Minnesota experiment. *Mandatory Arrest Doesn't Deter Domestic Abuse, Study Concludes*, Milwaukee J., Sept. 13, 1989 (on file with the Washington University Law Quarterly).

155. See, e.g., Schulman, *State-by-State Information on Marital Rape Exemption Laws*, in D. RUSSELL, *RAPE IN MARRIAGE* (1982); Frieze & Browne, *Violence in Marriage*, in *FAMILY VIOLENCE*, *supra* note 1, at 76.

156. See, e.g., CAL. EVID. CODE §§ 782-83 (West Supp. 1991).

157. See generally Pagelow, *The Incidence and Prevalence of Criminal Abuse of Other Family Members*, in *FAMILY VIOLENCE*, *supra* note 1, at 263.

### III. THE FUTURE: FROM LOW VISIBILITY TO HIGH VISIBILITY; FROM ADJUSTMENT TO ARREST; SO WHAT?

All of the foregoing clearly shows that for some time now the problem of domestic violence has been highly visible. Recent studies and arguments suggest the possible intergenerational transmission of domestic violence to children who witness assaultive behavior in their homes. This possibility has further heightened concern for the problem.<sup>158</sup>

The impact upon the criminal justice process has been immense.<sup>159</sup> Domestic violence training for police is now commonplace. Arrest is now mandated in some places, and preferred most everywhere else.<sup>160</sup> In San Francisco, arrests increased by forty-six percent in the early 1980s and written reports of domestic violence increased by one hundred percent.<sup>161</sup> The Los Angeles Police arrested 5000 alleged spouse batterers in both 1986 and 1987, as compared with 600 in 1985.<sup>162</sup>

One of the new Sacramento DA's first administrative actions was to increase staffing of its vertical prosecution program, thereby placing a greater emphasis on the crackdown on domestic violence.<sup>163</sup> In San Francisco, filed charges increased 136 percent, and the conviction rate in felony cases increased by 44 percent, in the early 1980s.<sup>164</sup> On the beautiful island of Maui, the prosecutor employs a "no-drop" policy. Victims are subpoenaed. The use of voice video cameras by responding officers as a subsequent aid in charging, convicting, and sentencing is being considered.<sup>165</sup> Diversion programs are under attack for having "only" a fifty percent success rate, allowing the defendant to escape the wrath of the criminal justice process, and merely being a release valve for the increase

158. See, e.g., Kalmuss, *The Intergenerational Transmission of Marital Aggression*, J. OF MARRIAGE & FAMILY 11 (Feb. 1984).

159. See generally Elliot, *supra* note 150.

160. See *Mandatory Arrest Doesn't Deter Domestic Abuse, Study Concludes*, *supra* note 154. For example, according to Commissioner Anthony Salina, arrest is not only preferred in Connecticut but assaultors are arrested despite the victim's wishes to the contrary. Comments made at "Mediation and Domestic Violence" Conference, Chicago, Ill., May 24-25, 1989, sponsored by Association of Family and Conciliation Courts.

161. E. SOLER, THE SAN FRANCISCO FAMILY VIOLENCE PROJECT: AN OVERVIEW M-3 (available from San Francisco Family Violence Project, Building One, Suite 200, 1001 Portrero Avenue, San Francisco, CA 94110).

162. *Domestic Violence Program Comes Under Criticism*, Sacramento Daily Recorder, July 20, 1988, at 5, col. 1.

163. E. SOLER, *supra* note 161, at M-5.

164. *Id.*

165. Remarks by Judge Douglas McNish at Conference, *infra* note 169.

in cases.<sup>166</sup> Chicago and Los Angeles have established new domestic violence courts—highly touted as a way to reduce case and participant confusion, and to increase efficiency, sensitivity, and expertise.<sup>167</sup>

Judicial training programs and lengthy benchbooks for dealing with domestic violence cases are being provided. Batterer's treatment programs have proliferated from Connecticut to Hawaii and in between. Mandated by legislation or practice, some programs attempt to explain domestic violence as a product of cultural sex role expectations and attempt re-education; most employ support group therapy techniques; all, in various ways, place responsibility on the offender and offer alternatives to violence through stress or anger control management methods. Meanwhile, protective orders and other civil remedies proliferate and crisis shelters continue to be available.<sup>168</sup>

The emphasis of all of these changes is on publicizing that domestic violence is a very serious crime, and that the batterer will be held accountable for his acts by arrest, prosecution, and incarceration, if necessary. The victim's realization of empowerment through access to a justice process that is sensitive and responsive to her need for protection has the highest priority. There are no signs of battered women's advocates letting up the pressure to continue in the direction of maximum use of the criminal judicial process.<sup>169</sup> Nor are there many signs that legislators, police officials, prosecutors, judges or even academics are any less influenced by that pressure. That is the direction we seem to be going in the nineties. But is this a reasonable, sensible, realistic approach?

To be sure, the 1981 Minnesota experiment seemed to show that arrest, when used instead of the two non-arrest response alternatives, reduced repeat offenses by about fifty percent for a period of six months.<sup>170</sup>

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166. See, e.g., *Wife Beaters Use Law to Avoid Jail, Critics Say*, Sacramento Bee, July 18, 1988, at AB, col. 1; *Domestic Violence Program Comes under Criticism*, Sacramento Daily Recorder, July 20, 1988, at 5, col. 1.

167. See, e.g., *New Protections Help Domestic Violence Victims*, Sacramento Daily Recorder, Nov. 3, 1987, at 5, col. 1.

168. See generally, Saunders & Azar, *Treatment Programs for Family Violence*, in *FAMILY VIOLENCE*, *supra* note 1, at 481.

169. In May of 1989, in fact, they picketed a National Forum on Mediation and Domestic Violence in Chicago, fearing any turning away from full enforcement of the criminal law, although the focus of the Association of Family and Conciliation Courts' Forum was on how to deal with domestic violence in the process of custody mediation. From author's personal observations at "Mediation and Domestic Violence" Conference, Chicago, IL, May 24-25, 1989, sponsored by Association of Family and Conciliation Courts.

170. See *supra* note 152 and accompanying text.

And a subsequent BJS analysis of 1978-1982 National Crime Survey victimization data concluded that just calling the police reduced repetition by as much as sixty-two percent over the subsequent six months.<sup>171</sup> But here the ultimate conclusion of the most recent reported study from Omaha bears repeating and may return us to square one: "It is clear, however, that arrest, by itself, was not effective in reducing or preventing continuing domestic conflict in Omaha, and that a dependence upon arrest to reduce such conflict is unwarranted, perhaps erroneous and even counterproductive."<sup>172</sup>

Annette Jolin, comparing pre-1977 Oregon Homicides with post-1977 homicides in an effort to gauge the impact of Oregon's mandatory arrest law, found a ten percent decrease in domestic homicides, while nondomestic homicides increased by ten percent.<sup>173</sup> But again, the implications of this data are unclear and further confused by another more recent research report on domestic violence which concluded "that there is no way police can predict that a particular situation is likely to lead to murder."<sup>174</sup>

Despite all of the chronicled changes, there is really no sign that domestic violence is diminishing! Statistics used by full enforcement advocates in their continual lobbying efforts to show the extent of the problem may just as well be used to show a lack of overall success in stemming the tide of domestic violence after a decade of mass publicity and legal changes. Of course, a decade is perhaps not long enough for any signifi-

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171. P. LANGAN & C. INNES, SPECIAL REPORT: PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN (Bureau of Justice Statistics, U.S. Dept. of Justice 1986).

172. E. DUNFORD, D. HUIZINGA & D. ELLIOT, *supra* note 154, at 67.

173. Jolin, *Domestic Violence Legislation: An Impact Assessment*, 11 J. POLICE SCI. & ADMIN. 451, 454 (1983).

174. 21 CRIM. J. NEWS NO. 4, at 3-4 (Feb. 15, 1990) (summarizing and quoting from CRIME CONTROL INSTITUTE, PREDICTING DOMESTIC HOMICIDE: PRIOR POLICE CONTACT AND GUN THREATS). The summary continued:

Researchers at the Washington, D.C.-based Crime Control Institute had hoped to find patterns that could help police intervene and prevent domestic homicides. But after studying more than 15,000 incidents in Milwaukee over a 22-month period, including 33 domestic homicides, they were unable to identify any such indicator.

The institute specifically rejected the "escalating violence" theory (that a domestic homicide often is the culmination of increasingly frequent and severe attacks upon the victim). Contrary to what one might expect, in 32 of the 33 domestic homicides in Milwaukee, there was no police record of previous domestic violence by the suspect against the victim.

Furthermore, in more than 1,000 cases where police were called to protect a particular victim from a particular offender, often repeatedly, no homicide occurred in the period studied. "Even prior pointing of guns with death threats fails to predict domestic homicide," the researchers concluded.

cant reduction to have occurred or any definitive evaluation to be published. It is also possible, however, that nothing the legal system does will alter the rate of domestic violence.<sup>175</sup> Indeed, some battered spouse advocates acknowledge, at least in private, that what is required is a nationwide reversal of a whole generation of children's sex-role understanding. This may indeed be true; it may also be unrealistic. It is uncertain whether this could happen soon, if at all.

In fact, the criminal justice process in a free society probably has little to do with the rates of most crimes. Fluctuations have long seemed to have more to do with unpredictable, indirect, external societal influences than any criminal process responses. As difficult as apprehension and conviction often are, once accomplished, recidivism continues to skyrocket, with the period of incapacitation as the only really effective deterrent. But with our jails and prisons bulging, should incarceration be a priority for domestic offenders even though we believe repetition and escalation may occur? We continue to hope that one day rehabilitation programs will work. Yet, their lack of significant success has in part led to the incarceration explosion.

Also, in 1988, fifteen battered women were murdered in Minnesota, the model state for the arrest experiment and a state with a comprehensive protective order statute. Referring to one of these victims, Julie Tiley, lobbyist for the Minnesota Coalition for Battered Women said: "She did everything right, the system did everything right. The police had arrested him several times. She had an order for protection several times, and she had one when she died."<sup>176</sup> In Brentwood, New York, a protective order, augmented by a burglar alarm and a hand emergency beeper, failed to protect a homicide victim from her former husband three days after he was arrested for attempting to murder her and released on bail.<sup>177</sup>

The BJS *National Crime Survey Report of Criminal Victimization in the United States for 1987*, published in June 1989, shows fifty-three per-

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175. Or, as Frank Zimring says, in arguing for comparative law research:

Yet the pervasiveness of intimate violence in Western culture suggests that there is a parochial limit to current discussion of the control of such violence in the United States. . . . Family violence, like the poor, may be always with us, but in different proportions and with different outcomes.

Zimring, *Toward a Jurisprudence of Family Violence*, in *FAMILY VIOLENCE*, *supra* note 1, at 547, 567-68.

176. 20 CRIM. J. NEWSLETTER No. 8, at 4-5 (Apr. 17, 1989).

177. *Id.*

cent of simple assaults and thirty-nine percent of aggravated assaults are by non-strangers. FBI, *Crime in the United States - 1986*, reported thirty percent of female homicide victims were killed by husbands or boy-friends, with six percent of male homicides similarly attributed. Other statistics vary, depending upon the source, but the extent of the problem is rarely minimized. For example, women's rights advocates variously report that from 1.8 to 4 million American women are subjected to domestic violence each year; violence will occur at sometime in one-fourth to two-thirds of all marriages; and twenty percent of women seeking emergency surgical procedures are victims of domestic violence.<sup>178</sup> Closer to home than all these statistics are the incidents of domestic violence reported daily in our own academic communities—highly educated, upper-middle-class individuals, supposedly the most sensitive to the goals of sexual equality, knowledgeable of the problem of domestic violence, and aware of the availability of enlightened law enforcement agencies.<sup>179</sup>

While paying lip-service to the complexity of domestic violence incidents, single-issue reform advocates continue to look for a solution. Many more years of searching for solutions to much less complex crimes than these have taught that no solutions may exist. Eliminating judicial discretion in sentencing by mandatory prison legislation<sup>180</sup> and preventive detention<sup>181</sup> have contributed to the prison and jail overcrowding problem and undoubtedly caused the release or non-incarceration of others who should be locked up. Similarly, mandatory arrest and prosecution or fuller enforcement in domestic violence cases will not only exacerbate the overcrowding problem but will reduce or eliminate law enforcement efforts directed at other crimes. Perhaps domestic violence is that important, but crime prioritizing, resource allocation, and sentencing judgments have traditionally been made by police, prosecutors, and courts with public input, but not by the difficult-to-change mandates of legislatures subject to the pressures of the moment.

Should domestic violence be taken seriously? Of course. Should arrest be a serious alternative, exercised more often than in the past? Defi-

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178. See, e.g., "Domestic Violence Fact Sheets," National Woman Abuse Prevention Project (c. 1988) 2000 P Street, N.W., Suite 508, Washington, D.C. 20036.

179. *Why Domestic Violence Exists*, Cal. Aggie, Apr. 13, 1989, at 1, col. 1 (U.C. Davis campus newspaper).

180. See, e.g., CAL. PENAL CODE §§ 1203.06-.07 (West Supp. 1991).

181. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987); The Bail Reform Act of 1984, 18 U.S.C. § 3142 (1988); CAL. CONST. art. I, § 12.



nately. Should prosecutors charge and go to trial frequently even when confronted with an uncooperative victim? Yes. Should judges dismiss less and incarcerate more even though the family may require public funds for its sustenance? Surely. Accordingly, I continue to stand by what I wrote in 1978:

Incidents of inter-spousal violence, no matter how minimal, must remain subject to police intervention. For years a disproportionate number of disturbances, assaults, batteries, uses of deadly weapons, mayhem, and homicides have involved family members. Despite the resources necessary and the danger inherent in responding to such calls, no entity other than a police agency has the authority and ability to cope with such volatile situations. Central to the function of the police and the criminal law is the protection of life and limb.

The basic question is: what response, if any, should the legal system make after the dispute has been halted by police intervention? This is a crucial stage for another reason. It is at this point that an offender and a victim in a continuing volatile situation have been identified. All of the data showing the extent of inter-spousal violence and the experience of escalation from minimal to aggravated injury indicate that it would be irresponsible governmental action to drop the matter at this point. In fact, however, what we have been doing is to ignore the extremely important preventative, corrective, retributive, incapacitative, and deterrent implications of this early official knowledge of subsequent potential violence. At the very least, an adequate record keeping procedure must be implemented so that all those responding to subsequent incidents will know of the disputants' prior history so that an appropriate relevant additional response can be made. But even more important than our criminal law's traditional escalation of meaningless slaps on the wrist until too late, is recognition of the need for a breakthrough at the outset to the consciousness of the disputants as to the seriousness of their behavior and not later than the second time around at most.

In my judgment, only the coercive, authoritative harshness of the criminal process can do this.<sup>182</sup>

But fuller use of the criminal process need not be followed by a loss of administrative discretion. Rather a change in emphasis and a restructuring of the exercise of that discretion may be what is necessary. Indeed, anything else would diminish our knowledge of the incredible complexity inherent in incidents of domestic violence and the need for appropriate societal responses thereto, first discovered in the ABF data. The police

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182. *The Relevance of Criminal Law to Interspousal Violence*, *supra* note 33, at 190.

may not have always dealt with this problem in the most appropriate ways. But the early research clearly shows that they, *better than anyone*, recognized its complexity and frequently tried novel approaches to deal with it. Undoubtedly, pressures from the women's movement largely brought about the high visibility of domestic violence. They took up where the ABF data began and rightly forced the law enforcement and legal processes to acknowledge the problem better and to be more responsive to the needs of all victims of violence. Lerman correctly stated that "the premise of the Model Act is that violence is caused by and is the responsibility of the perpetrator."<sup>183</sup> But to continue, as she does, that "violence is not the product of a relationship or the result of the interaction of the individuals"<sup>184</sup> totally overlooks the complexity of domestic violence and thus the necessity of allowing discretion, albeit better trained and guided, to be exercised by those responding to individual cases.

The constant possibility of domestic strife is inherent in all adult living situations. The opportunity and motive for violence are always present because of the intimate, continuing, and largely private contact between the parties that necessarily give rise to the frustrations and friction of daily living. When intoxication is thrown into this setting, as it frequently is, the risk of lashing out increases dramatically.<sup>185</sup> In this milieu, police, prosecutors, judges, and other outsiders must make decisions. The parties themselves are frequently uncertain as to what form of intervention they want. Indeed, they may not know what future relation they want with each other. The intervenors know that whatever they do, or do not do, will affect the relationship between the parties, their economic status, and any children involved. But they cannot really be sure how. Is it always better for the disputants and society for sometimes-violent couples to be apart rather than together? Is it always better for children and society to be in single-parent homes rather than with a quarreling, sometimes violent couple? Each incident is different in hundreds of ways. I submit that we simply do not know, and may never know with any certainty, the answer to these basic questions, much less how best to respond to the myriad types of incidents arising each day.

For example, in a recent Sacramento case, a 34-year-old woman, after being in a coma for two-and-a-half months and undergoing eight opera-

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183. Lerman, *supra* note 84, at 67.

184. *Id.*

185. See Frieze & Browne, *Violence in Marriage*, in FAMILY VIOLENCE, *supra* note 1, at 192-96.

tions, helped convict her boyfriend who had punched and kicked her, puncturing her kidney. Though she was glad she testified, she did not want him to go to prison. "You spend nine years of your life with this one person," she said. "That person was there when you went into the hospital to have your kids. That person was there when nobody else was. You cannot hate this person. It's just like cutting off part of your arm."<sup>186</sup> The boyfriend was subsequently sentenced to six years in prison. His attorney said that the sentence was too long for a man with no criminal history, who worked steadily, and had been a good father to all four of the children—two of them his own. The defense attorney said: "I understand the reasons for the sentence, given the hue and cry about this kind of offense. But I think the law as it presently stands and is implemented by the judges because of the public pressure is too rigid."<sup>187</sup>

Decisionmaking should, of course, be absolute in rejecting the consideration of some facts. For example, one's race certainly should not be considered as a reason for not enforcing the law, as the ABF data found it to have been in the past.<sup>188</sup> It is ironic, however, that race may indeed again become an indirect factor—this time under a mandatory arrest policy, because impoverished victims tend to call the police for assistance more often than those better able to afford other alternatives. Frank Allen's essay, "The Borderland of Criminal Law: Problems of Socializing Criminal Justice" is again pertinent.<sup>189</sup> Allen asserts that: "When penal treatment is employed to perform the functions of social services, selection of those eligible for penal treatment proceeds on inadmissible criteria . . . by reference to their poverty or their helplessness."<sup>190</sup> In such instances, he says, neither effective social services nor equity prevail.

Many other factors, however, appear to be worthy of consideration for appropriate decisionmaking in these cases. Thus, was the draft set of guidelines for a proposed settlement of a class action suit against the Los Angeles police well-founded in telling police that they must make decisions "according to the same standards which govern the decision to report to, remain at, or leave the scene of similar or identical crimes that do not involve an incident of domestic violence"? They may not even consider such factors as 1) whether the victim and suspect are living to-

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186. Sacramento Bee, June 19, 1989, at A1, col. 10.

187. Sacramento Bee, July 26, 1989, at B4.

188. See, e.g., Goldstein, *supra* note 5.

189. Allen, *supra* note 99, at 7.

190. *Id.*

gether; 2) whether society would prefer keeping family units intact; and 3) speculation about reconciliation.<sup>191</sup>

Certainly violence, whatever the cause, must be taken seriously, and the offender held accountable in some way, unless the act was legally justifiable. But victim precipitation is a crucial part of the battered woman syndrome defense to conviction and in amelioration of sentence, yet its mere use as a factor in decisionmaking when the victim is a woman is deemed objectionable sexism. Is this reasonable? In other words, are not all of the facts surrounding the incident under question, particularly those going to motive, at least relevant to appropriate arrest, charging, diversion, and sentencing decisions? For most other less complicated offenses they are. Why not in complex domestic violence cases?

Allen and Anthony Platt shed some light on this question. Allen said: We should not overlook the fact that, in many areas, our basic difficulties still lie in our ignorance of human behavior in its infinite complexities. . . . Ignorance, of itself, is disgraceful only so far as it is avoidable. But when, in our eagerness to find 'better ways' of handling old problems, we rush to measures affecting human liberty and human personality on the assumption that we have the knowledge which, in fact, we do not possess, then the problem of ignorance takes on a more sinister hue.<sup>192</sup>

The parallel to where we are in dealing with domestic violence and how we got there is apparent in the theme of Platt's 1969 book, *The Child Savers: The Invention of Delinquency*. He argued that the juvenile court had its origin in largely middle-class women reformers who:

viewed themselves as altruists and humanitarians [who nonetheless] brought attention to—and, in doing so, invented—new categories of . . . misbehavior which had been hitherto unappreciated . . . . Granted the benign motives of the savers, the progress they enthusiastically supported diminished. . . civil liberties and privacy. . . . Although the savers were rhetorically concerned with protecting. . . their remedies seemed to aggravate the problem.<sup>193</sup>

My point is a simple one. We have come about as far as we can or should go toward the full enforcement of laws against domestic violence. Indeed, we have gone too far with mandatory provisions. Victim advocates have had a tremendous impact by heightening visibility and pushing largely positive reforms. But it is time now for them to stop their

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191. L. A. Daily J., Aug. 28, 1985, at 1.

192. Allen, *supra* note 99, at 13.

193. A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 3-4 (1969).

narrow, gender-focused arguments for further changes. More important, it is time for policymakers to resist pressures from them. It is time for everyone to regroup and evaluate what more can or should be done. Most important, it is time to recognize the tremendous complexity of dealing with crime in general, accentuated in cases of domestic violence as first pointed out by the ABF data and writers. Such complexity probably has no solution in a free society, but it can at best be stabilized by allowing decisionmakers adequate leeway to utilize scarce resources within the bounds of structured exercises of discretion, considering all relevant factors.<sup>194</sup>

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194. University of Wisconsin Law Professor Herman Goldstein, long a leading researcher and scholar on policing, succinctly summed up much of the problem in his Sept. 4, 1989, memo to this author, as follows:

In Madison [Wisconsin], for example, the police, the prosecutor, and the courts were, on their own initiative moving toward a rather sophisticated response to spousal abuse cases, with a commitment to arrest and prosecution, but with some room for discretion and the use of alternatives. I felt it led to much progress in both effectiveness and fairness. But the legislative mandate to arrest has swamped the system, eliminating much of the discretion that was being exercised, with results that, in my personal opinion, threaten the progress that was made. I understand that the legislature is being asked to amend the statute to return some discretion to both the police and the prosecutor, and that the amendments are being endorsed by those who have been most adamant for a blanket form of mandated arrest. Thus, those concerned about the problem are gradually learning what I believe we learned in the ABF study; that responding intelligently to a behavioral problem requires, most importantly, that we recognize its complexity.